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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 570

SNELLING AND SNELLING OF BALTIMORE, INC., *Petitioner*

v.

ANGELO R. MASCARO, THE A. S. ABELL COMPANY AND THE C & P TELEPHONE COMPANY OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Petitioner, Snelling and Snelling of Baltimore, Inc., prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland reversing a decree of the Circuit Court No. 2 of Baltimore City and vacating that court's injunction prohibiting Angelo R. Mascaro from advertising the trade name "Snelling and Snelling" in competition with petitioner in the employment agency business in Baltimore, Maryland unless Mascaro included in his use of the name explanatory language designated in the decree intended to distinguish his business from that being conducted by petitioner.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the Circuit Court No. 2 of Baltimore City (*infra*, Appendix D) is not reported. The opinion of the Court of Appeals of Maryland (*infra*, Appendix A, for majority opinion, Appendix B, for dissenting opinion) is reported at 250 Md. 215, 243 A.2d 1.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on May 31, 1968 (R. 1, 3, 24). ("R." refers to the record certified to this Court by the Court of Appeals of Maryland.) A timely motion for reargument, filed on June 26, 1968, was denied on June 28, 1968 (R. 1, 35). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3), since the judgment of the Court of Appeals of Maryland and its subsequent denial of petitioner's motion for reargument infringed rights, privileges and immunities specially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the judgment of a state appellate court reversing the decree of a state trial court, though involving issues of state law alone, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States when it is premised upon a ground which was neither raised, considered or decided in the state trial court nor briefed or argued in the state appellate court.

2. Whether petitioner has the exclusive right to use the trade name "Snelling and Snelling" in the employment agency business in Baltimore, Maryland and is hence entitled to exclude Angelo R. Mascaro or anyone else from using the name in the same business in that City.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This cause began on January 7, 1966, when petitioner filed in the Circuit Court No. 2 of Baltimore City its bill in equity seeking to enjoin Angelo R. Mascaro from unfairly competing by using a trade name, "Snelling and Snelling", which petitioner had been using for about five years, in the employment agency business in Baltimore, Maryland and its environs. Petitioner also sought to enjoin The A. S. Abell Company, Baltimore publisher of daily newspapers of general circulation (the Sunpapers), from accepting from Mascaro advertising in which the trade name in issue appeared and to enjoin The C & P Telephone Company of Maryland, the local telephone company, from accepting from Mascaro for insertion in its local directories telephone listings or advertisements in which the trade name was employed. (E. 1-6) ("E." refers to the Joint Record Extract filed in the Court of Appeals of Maryland, part of the record certified by that court to this Court (R. 2).)

Petitioner, a Maryland corporation, was formed in July, 1960 to engage in the employment agency business. It began to do business in August, 1960. It has operated from the same office in Baltimore since that time. Its business consists of obtaining applicants for employment and placing them in jobs. It charges a fee based on a schedule of rates graduated according to starting salary. Maynard Z. Drossner has been petitioner's president, principal participant and managing officer and a director and stockholder since its inception. (E. 33, 34, 56, 313-314)

Petitioner used a trade name, "Snelling and Snelling", continually since 1960. Until December, 1965, petitioner and its permittees were the sole users of the name in the Baltimore area. During that period three companion companies, in each of which Drossner had an interest, joined petitioner, with its consent, in use of the name. These were Snelling and Snelling of Highlandtown, Inc., in December, 1963, Snelling and Snelling of Towson, Inc., in January, 1964, and Snelling and Snelling of Glen Burnie, Inc., in June, 1965. Each was a Maryland corporation formed by Drossner and others to engage in the employment agency business. Except for Drossner, each was under diverse ownership, different from that of petitioner. Each was located in an area in (Highlandtown) or near (Towson and Glen Burnie) Baltimore from which it took its respective corporate name. Ultimately the four companies functioned as a group in their advertising activities. (E. 33, 34, 315, 318, 409-414, 414-430, 430-447)

The name "Snelling and Snelling" had no trade or business value in 1960 in the Baltimore area. (At trial Drossner testified without contradiction that, "In fact it was our biggest liability rather than our biggest asset." (E. 36)) Despite initial difficulties, occasioned in part by residual effects from the business failure of an earlier, unsuccessful user of the name (*e.g.*, because petitioner employed the same trade name, creditors of the prior user, including newspapers and the telephone company, which supplied services essential to petitioner's business, dunned petitioner for its predecessor's unpaid bills and displayed a reluctance to deal with petitioner at all) and after a hiatus in the use of the name for a year and a half following that failure, by 1965, through vigorous business practices and extensive newspaper, television and radio advertising involving expenditures in the range of $100,000, petitioner had elevated the name "Snelling and Snelling" to be the paramount trade name, representing the largest operator, in the employment agency business in the Baltimore area. Thereupon Mascaro appeared, in Dundalk, Maryland, a section of Baltimore County sharing a common

boundary with Baltimore City, and began advertising the same trade name as petitioner was using, viz. "Snelling and Snelling", in the same business in which petitioner was engaged, in the same area in which petitioner was operating, in newspapers published in Baltimore and circulated there and in surrounding areas. Petitioner promptly sought to enjoin him. (E. 1-6, 36-38, 57, 60, 63, 72, 300, 301)

Petitioner first acquired the right to use the trade name "Snelling and Snelling" by virtue of a franchise or licensing agreement with Snelling and Snelling, Inc., a Pennsylvania corporation engaged, *inter alia*, in selling franchises in the employment agency field. Petitioner's contract, made in Philadelphia on July 5, 1960, provided in pertinent part as follows: (Snelling and Snelling, Inc. is referred to in the contract as "SNELLING". Petitioner is referred to therein as "LICENSEE".)

* * *

> "1. (a) SNELLING hereby grants to LICENSEE the *exclusive right* to use the name SNELLING and SNELLING and/or SNELLING and SNELLING of BALTIMORE, INC. in connection with one office only to be opened by LICENSEE in Baltimore, Maryland. LICENSEE shall not directly or indirectly establish an office or place of business, or move to any locations outside of such territory; nor shall LICENSEE change its name without first obtaining the written consent of SNELLING; nor shall LICENSEE establish any branch or additional office without the written consent of SNELLING." (E. 386) (Emphasis supplied.)

* * *

> "LICENSEE agrees * * * when requested by SNELLING, to waive any and all objections LICENSEE may legally have against the use of the name 'SNELLING AND SNELLING' in territories other than that territory granted to LICENSEE herein." (E. 390)

Petitioner paid Snelling and Snelling, Inc. $2,000 for the franchise and agreed to pay, on a monthly basis, "an over-

ride" (E. 387) of five per cent of its gross monthly receipts, plus an additional two per cent of such receipts towards national advertising, later changed to a flat seven per cent override, all of which Snelling and Snelling, Inc. could use for whatever purposes it wished. The contract was written on a printed form, prepared and filled in by Snelling and Snelling, Inc. and its lawyer. Neither petitioner nor anyone in its behalf had anything to do with preparation of the contract. When the contract was signed, Snelling and Snelling, Inc. had about forty franchised offices, but none under diversified ownership in any suburbs of major cities in which there were offices operated by other franchisees, or adjacent to large metropolitan areas where there were offices operated by other franchisees, *i.e.*, none where any confrontation existed similar to that which arose between petitioner in Baltimore and Mascaro in Dundalk. (E. 1-6, 18, 73, 83, 100, 102, 109, 191, 229, 230-232, 238-240, 261, 294-295)

After a period of negotiation, Mascaro signed a franchise contract with Snelling and Snelling, Inc. on November 4, 1965, more than five years after petitioner's contract, for the Dundalk-Essex area, adjacent to Baltimore City. He knew of the prior presence of petitioner and its companion companies. He was aware of contentions about his area before he signed, although he denied knowing of the "exclusive right" form of petitioner's contract. Before he had completed arrangements for opening his office, he knew that petitioner had a serious complaint which might affect his ability to operate. He sought reassurance from Snelling and Snelling, Inc. at least fifteen or twenty times. He was reassured on each occasion. Part of such reassurance was a promise by Snelling and Snelling, Inc. to pay for defense of any litigation which might ensue. That company in fact paid for Mascaro's defense in this cause. (E. 116-121, 130, 132, 143-145, 174-176, 263, 467-482)

Throughout their dealings, Snelling and Snelling, Inc. endeavored, unsuccessfully, to get petitioner to give up its "exclusive right" form of contract. Snelling and Snelling,

Inc. discontinued use of that form of contract. None of the other contracts put in evidence at trial of this cause, *i.e.*, those of Snelling and Snelling of Highlandtown, Inc., Snelling and Snelling of Towson, Inc. and Snelling and Snelling of Glen Burnie, Inc. (each of which had a contract with Snelling and Snelling, Inc.), a blank form of contract in use by Snelling and Snelling, Inc. at time of trial and Mascaro's contract, contained the "exclusive right" language. From its inception to September 30, 1966, petitioner paid Snelling and Snelling, Inc. more than $65,000 in overrides and advertising payments. (E. 237, 298, 299, 300, 301, 302, 361-367, 378, 395-409, 409-414, 414-430, 467-482)

Advertising is the *sine qua non* of the employment agency business. All involved acknowledged as much. At trial Drossner said that without advertising "we would have no business" (E. 58). Robert O. Snelling, Jr., president of Snelling and Snelling, Inc., a witness for Mascaro and one of his principal protagonists, said that "the only way we * * * (solicit applicants) is through advertising" (E. 219) and noted that "to get an applicant through the door you have to put an ad in the paper" (E. 250). Mascaro said that "[a]s Mr. Drossner has put it, the advertising is the life line of this business" (E. 134). Robert O. Snelling, Jr. agreed (E. 247).

In its bill of complaint petitioner alleged a proprietary interest in the trade name "Snelling and Snelling" by reason of its prior user of and development of value in the name. It did not include any averments referring to its contract with Snelling and Snelling, Inc. In his answer Mascaro, *inter alia*, averred that petitioner was "guilty of unclean hands in that the Bill of Complaint * * * fails to make a full and frank disclosure of all the facts, to wit, that both Complainant and Defendant are licensees of Snelling and Snelling, Inc. * * * by virtue of contracts dated July 5th, 1960 and November 4th, 1965, respectively." (E. 16, 17) That was the sole basis upon which Mascaro relied for his proposed defense of "unclean hands". (E. 12-17)

Following mesne proceedings (E. 6-11, 12-17), including a preliminary hearing which resulted in an interlocutory order, made on February 2, 1966, imposing upon all defendants an "explanatory phrase" injunction pending full hearing and final determination on the merits (E. 11-12), the case was tried in the Circuit Court No. 2 of Baltimore City (Charles D. Harris, Judge) from October 25, 1966 to October 31, 1966. Voluminous testimony was taken (E. 32-312). Numerous exhibits were introduced (E. 313-511).

Ample evidence of public confusion caused by Mascaro's openly acknowledged use of the identical trade name employed by petitioner was adduced. Among those shown to have been confused were a young job applicant, his mother, the billing department of the Sunpapers, the State Department of Labor and Industry of Maryland, which licenses employment agencies, and the United States Treasury Department. (E. 112-114, 265-282, 295-298, 358-360)

No mention was made at trial of any "estoppel" defense. Mascaro's chief defense, propounded for him by his witness Robert O. Snelling, Jr., was that his competing with petitioner was not really harmful, but was actually helpful, to petitioner, since (in the words of the court, in its memorandum opinion, summarizing Snelling's remarks on the subject) "each office works not only for itself but for the benefit of all other Snelling and Snelling offices, in a manner akin to a 'one big happy family' arrangement" (E. 25). Later, when asked why his company, as a consideration for allowing Snelling and Snelling of Highlandtown, Inc. to open its office (with petitioner's consent) in Highlandtown, a section of Baltimore bordering on Dundalk, had exacted a change in petitioner's override arrangement, Snelling indicated the reason was that the presence of an office in Highlandtown would adversely affect his company's ability to sell the Dundalk-Essex area, a position inconsistent with his earlier "one big happy family" theory. He said, on the point, "No, there was no charge, I got him (Drossner) to change his contract. I had no obligation to allow him to open that office. Of course, he was putting it close enough to a bor-

der to kill the potential sale of a franchise in the suburbs possibly, and because of this, I exacted a change in the franchise agreement to seven per cent." (E. 260) Snelling acknowledged that Mascaro's advertising constituted use by Mascaro of the trade name "Snelling and Snelling" in Baltimore. (E. 247-250)

On December 6, 1966, the Circuit Court No. 2 of Baltimore City filed its memorandum opinion (*infra*, Appendix D). The court rejected petitioner's common law contentions and decided the case on the basis of petitioner's contract with Snelling and Snelling, Inc. The court concerned itself particularly with construction of the portion of that contract which granted to petitioner "* * * the *exclusive* right to use the name SNELLING AND SNELLING * * * in connection with one office only to be opened * * * *in Baltimore, Maryland*". (E. 18) (Emphasis is the court's.) The court interpreted that language as granting petitioner the exclusive right to use the name involved in Baltimore City, such exclusive right to be exercised in connection with one office only in that city. The court found that Mascaro, as licensee under his agreement with Snelling and Snelling, Inc., was by using the name "Snelling and Snelling" in Baltimore City unfairly competing with petitioner. The court found that Mascaro's activities in Baltimore City, as for instance, his advertising, though carried on from his office in Dundalk, infringed petitioner's exclusive right. The court hence afforded petitioner injunctive relief. The court declined to extend the injunction to The A. S. Abell Company or The C & P Telephone Company because they were not parties to the contracts involved. (E. 30) In its memorandum opinion, the court made no mention of any "estoppel" point.

On January 4, 1968, the court filed its decree (*infra*, Appendix E). The injunction thereby imposed upon Mascaro required him to accompany his public use of the name "Snelling and Snelling" with the identifying designation, "of Dundalk-Essex, A. R. Mascaro" (E. 31), and the explanatory legend, "not connected with any other Snelling and Snelling

office in this (or 'the Baltimore') area" (E. 32). The decree made no mention of any "estoppel" point or principle.

Mascaro appealed from the decree. Petitioner, because the court failed to issue an outright, rather than an "explanatory phrase" injunction and to include within its scope The A. S. Abell Company and The C & P Telephone Company as well as Mascaro, cross appealed. The appeals were filed in the Court of Appeals of Maryland on August 14, 1967. (R. 1) Thereafter briefs were filed (two on each side, one in the appeal and one in the cross appeal) by petitioner and by Mascaro. The A. S. Abell Company and The C & P Telephone Company, though parties to the appeals (at least to the cross appeal) did not file briefs, or appear at argument, or take any active part in the case. No "estoppel" point was mentioned in any of the briefs filed.

The case was argued on April 5, 1968, before a panel of five judges. On May 31, 1968, the Court of Appeals of Maryland filed its opinion (*infra*, Appendix A) and entered its judgment. It reversed the decree of the Circuit Court No. 2 of Baltimore City and vacated the injunction imposed upon Mascaro by that court. (R. 1) One judge, Judge Horney, participated in the hearing of the case, in the conference in regard to its decision and in the adoption of the opinion, but had retired from the court prior to the filing of the opinion. (R. 3) One judge, Judge Barnes, dissented and filed his dissenting opinion (*infra*, Appendix B), also on May 31, 1968. (R. 1)

In the majority opinion, the Court of Appeals of Maryland, as one basis for reversing the decree of the trial court and vacating the injunction against Mascaro, found that petitioner was estopped from obtaining the relief which it sought. The court held that the estoppel principle prevented petitioner from attacking Snelling and Snelling, Inc.'s licensing system, which resulted in Mascaro's competing with petitioner *in Baltimore City*, because Drossner, petitioner's principal participant, had himself benefited by that same system. The majority of the court said on the point that:

> "* * * Drossner is estopped from challenging the validity of the licensing system which he used to his own advantage when he obtained the Towson and Glen Burnie franchises, and from attempting to impose upon Mascaro limitations with respect to access to communications media which he did not assert against Towson and Glen Burnie. To permit him to do so would be to sanction the weaving of the very web of broader exclusivity which be failed to achieve by contract. * * *" (*Infra,* Appendix A, at page App 20)

The majority of the court also held that petitioner's "exclusive right to use the name" Snelling and Snelling "in connection with one office only" "in Baltimore City" (E. 386), acquired from Snelling and Snelling, Inc. in the contract of July 5, 1960, was not really an exclusive right at all, not even so long as such use was connected with one office only in Baltimore City, but that petitioner's right was "not an unrestricted right" (R. 16) and that Snelling and Snelling, Inc. hence retained for itself "the right to use the name in Baltimore in ways not connected with the Baltimore office" (R. 16) and could assign that right to another, that is, in the instant cause, to Mascaro.

How the federal question is presented.

The federal question involved in the instant cause did not arise until the Court of Appeals of Maryland premised its judgment, adverse to petitioner, upon a ground, the principle of estoppel, which had not been raised, considered or decided in the trial court, or briefed or argued in the appellate court. That circumstance did not, as it could not, become known to petitioner until the opinion of the Court of Appeals of Maryland in this cause was filed. Thereupon, on June 26, 1968, petitioner filed in that court its timely motion for reargument. (R. 1, 35-47; *infra,* Appendix C) (An application for rehearing of a cause in the Court of Appeals of Maryland is required to be made by means of a "motion for reargument". Maryland Rules of Procedure, Rule 850.) That motion, in part, went on the ground that

the judgment there was invalid because based upon determination by the court of an issue as to which petitioner had been afforded neither notice nor hearing, *viz.* the issue of the existence *vel non* of an estoppel operating against petitioner, in violation of the requirements of the Due Process and Equal Protection Clauses of the Constitution of the United States. The motion was denied, without opinion or comment by the court, on June 28, 1968. Thus, as soon as it was necessary or appropriate to do so, in the highest court of Maryland as it happened, petitioner presented the federal questions here involved, which was there finally decided against it.

REASONS FOR GRANTING THE WRIT

A state court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

In its opinion below, the Court of Appeals of Maryland, one judge dissenting, announced as a basis for its judgment adverse to petitioner that petitioner was estopped, because of the conduct of one of its principals, Drossner, to claim the relief which it sought in this cause. That pronouncement represented the very first time in the entire case that such an issue of estoppel had been raised, considered, briefed, argued or decided. Then the court denied petitioner's motion for reargument, which in part asserted that interjection and determination of the issue of estoppel *vel non* without notice to petitioner that such an issue was being considered and without affording petitioner an opportunity to argue as to its merits was a deprivation of rights guaranteed to petitioner by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. Petitioner respectfully submits that thereby the Court of Appeals of Maryland decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

Such decisions of this Court, extending from *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187 (1965), to *Grannis v. Ordean*, 234 U.S. 385, 34 S.Ct. 779 (1914), and beyond, have uniformly held that notice and an opportunity to be heard are among the most elemental attributes of due process of law. Thus in *Armstrong, supra*, dealing with requirements for notice to a divorced father, said not to be supporting the child, of proceedings to adopt his daughter, under a Texas law which dispensed with any need for the father's consent if he was not supporting the child, this Court said:

> "In disposing of the first issue, there is no occasion to linger long. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306 at 313, 70 S.Ct. 652, at 656, 94 L.Ed. 865. * * *" (380 U.S. at 550, 85 S.Ct. at 1190)
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> * * *
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> "A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. * * *" (380 U.S. at 552, 85 S.Ct. at 1191)

Grannis, supra, is perhaps of special interest because there, as here, the Federal right involved was first raised (in a petition for reargument) and denied in the highest state court.

That was held to be sufficient to confer jurisdiction upon this Court, because there, as here, the Federal right was first infringed at the highest state level. (234 U.S. at 292, 34 S.Ct. at 782) The constitutional issue there had to do with the validity of service, by publication and mailing of a summons in a suit for partition of land lying in Minnesota, upon a Wisconsin resident who was a judgment creditor of one of the concurrent owners of the land. The question was whether that service constituted due process of law sufficient to confer jurisdiction on the Minnesota court to render a judgment in the partition case which would be binding upon an assignee of the judgment creditor as to his lien upon or interest in the land, he not having appeared in the Minnesota case. This Court, holding that there had been due process in the partition case, noted that:

> "The fundamental requisite of due process of law is the opportunity to be heard. * * *" (234 U.S. at 394, 34 S.Ct. at 783)

Petitioner suggests that the comments of this Court as to the need for notice and an opportunity to be heard are as applicable to an issue in a proceeding as they are to the case itself, especially when that issue is one upon which judgment is based, as was the situation in the Court of Appeals of Maryland with respect to the estoppel issue. That fundamental fairness which is requisite to the validity of any adversary proceeding must include at least an opportunity to know of and to be heard on such an issue. But petitioner was denied even that much below.

This Court has held that equal protection of the laws is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government. *Duncan v. State of Missouri*, 152 U.S. 377, 382, 14 S.Ct. 570, 572 (1894). But petitioner was not treated like all other litigants in the Court of Appeals of Maryland. By its rules and decisions that court has made known that it "will not ordinarily decide any point or question which does not palinly appear to have been decided by the lower court",

Maryland Rules of Procedure, Rule 885, and that even if a point is raised and decided in the trial court, it is still taken as having been waived if it is not briefed on appeal, *Harmon v. State Roads Commission*, 242 Md. 24, 217 A.2d 513 (1966). But the court treated petitioner according to some different rule. Prior to the court's opinion being filed, the estoppel issue had not even been mentioned in the case, yet that issue was made a basis of decision.

Nor is it meaningful to point to Mascaro's mention of "unclean hands" in his answer to petitioner's bill of complaint. Mascaro specified in his answer that he based that contention solely on petitioner's failure to aver in its bill as a basis for its claims its franchise agreement with Snelling and Snelling, Inc. Under such a pleading there would scarcely seem to be room to assert that petitioner ought to be estopped because Drossner saw fit to obtain other franchises from Snelling and Snelling, Inc. Ordinarily Maryland limits litigants to the subject matter and substance of their pleadings. Yet here the court itself apparently indulged in a substantial departure from the pleadings. The Court of Appeals of Maryland did not afford petitioner the equal protection of the laws, as it was required to do.

The federal constitutional question is of importance in the administration of justice.

The question presented by this case as to the ability of a state court of last resort, or any court, to base judgment on an issue as to which neither notice nor an opportunity for hearing is first afforded an affected litigant is one of critical importance in the administration of justice. The concept that a court can, in the face of Federal constitutional guarantees, validly act in such a manner is a formidable one. It goes to the roots of our system of jurisprudence. It threatens the foundations of due process. *Armstrong v. Manzo, supra, Grannis v. Ordean, supra.* It deprives all judicial proceedings of any order or certainty. This Court should not condone such action in any degree. Any deprivation of constitutional right requires prompt rectification.

Watson v. City of Memphis, Tenn., 373 U.S. 526, 538, 83 S.Ct. 1314, 1321 (1963).

The federal constitutional question pervades the whole case.

There is no adequate ground, unaffected by the Federal constitutional question here involved, sufficient to support the judgment and action of the court below. In its opinion, prior to raising the estoppel basis for its judgment, the Court of Appeals of Maryland, over the dissent of Judge Barnes, set out its disagreement with the construction which had been placed by the trial court on petitioner's "exclusive right" contract with Snelling and Snelling, Inc. The majority concluded that petitioner's right to use the trade name in issue in Baltimore was not exclusive at all, but was restricted, and that Snelling and Snelling, Inc. could sell to Mascaro the right to use the same name (the "exclusive right" to the use of which it had already sold to petitioner, for very substantial considerations, as it developed), in the same place and in competition with petitioner, so long as Mascaro's use was not connected with petitioner's Baltimore office! Aside from the question what such a construction does to the key characteristic of petitioner's contract, its "*exclusive* right" provision, the language being construed is at best ambiguous. It is at least as susceptible to the construction, favorable to petitioner, placed upon it by the trial court and for which petitioner contended in the court below, as it is to the interpretation adopted by the court below. That court should instead have followed the salutary rule, in force in both Maryland, *Cadem v. Nanna*, 243 Md. 536, 221 A.2d 703 (1966), and in Pennsylvania, *Kennedy v. Erkman*, 389 Pa. 651, 133 A.2d 550 (1957), where petitioner's contract was made, requiring construction of ambiguous language in a contract most strongly against the one who prepared it, in this instance Snelling and Snelling, Inc., through which Mascaro claimed, and should have afforded the contract the meaning placed upon it by the trial court. The court

instead misconstrued and in effect rewrote the contract, so that instead of having an exclusive right to use the trade name in issue in connection with one office *only* in Baltimore, petitioner was left with an utterly meaningless "exclusive" right to use that name *only* in connection with one office in that city.

Petitioner has no means of measuring the importance of the estoppel premise to the process by which the majority of the Court of Appeals of Maryland reached the result which it attained in this cause, but must assume that the issue had a substantial effect indeed, especially since it operated to support what petitioner says is an otherwise erroneous determination of the meaning of the contractual provision in issue. The estoppel argument certainly had an appreciable effect on the minds of the majority below. Otherwise the court would not have imported the estoppel point into the case. That the effect of that point cannot be separated from that of other factors which the court may have considered is a circumstance operating to confer jurisdiction on this Court. *Cf. Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 37 S.Ct. 318 (1917), where this Court declined jurisdiction in a case involving claims that a decision of the Nebraska state board of irrigation in favor of the asserted right of a canal company was not made upon due process because it was made without lawful notice or opportunity to be heard and hence could not be binding upon others interested in project involved, because the highest state court, which had decided against the due process contentions, had also decided that the canal company was entitled to prevail because its adversaries were estopped by their own conduct to question the canal company's claims.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Benjamin Lipsitz
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September 26, 1968

APPENDIX A

MAJORITY OPINION IN THE COURT OF APPEALS OF MARYLAND [1]

[Caption Omitted in Printing]

HAMMOND, C.J.
HORNEY*
MARBURY
BARNES
SINGLEY,
JJ.

OPINION BY SINGLEY, J.
BARNES, J. DISSENTS.

*Horney, J., participated in the hearing of the case, in the conference in regard to its decision and in the adoption of the opinion, but he had retired from the Court prior to its filing.

[Filed May 31, 1968]

This case comes to us on an appeal and cross appeal from a decree of the Circuit Court of Baltimore City entered in an equity proceeding brought to resolve a dispute which had arisen between two licensees of a national employment agency.

At the trial before the chancellor, the testimony was extensive and voluminous exhibits were introduced. We have no quarrel with the chancellor's findings of facts, which are carefully set out in his opinion. Maryland Rule 886a; *Wood v. Wood*, 227 Md. 211, 176 A.2d 229 (1961); *Parker v. Parker*, 222 Md. 69, 158 A.2d 607 (1960); *Moran v. Moran*, 219 Md. 399, 149 A.2d 399 (1959). We are not, however, bound by his conclusions of law. *Pallace v. Inter City Land Co.*, 239 Md. 549, 212 A.2d 262 (1965); *Space Aero Products Co. v. R. E. Darling Co.*, 238 Md. 93, 208 A.2d 74 (1965).

Snelling and Snelling, Inc. is a Pennsylvania corporation, which had its principal office in Philadelphia and later in

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[1] This opinion appears at pages 3-24 of the certified transcript of record (R. 3-24) herein.

Radnor, Pennsylvania. Although not a party to the case, it will be referred to in this opinion as "Philadelphia Snelling." Its operations have two aspects: In Philadelphia, commencing as a partnership in 1950, and later as a corporation, it has operated an employment agency. The other phase of Philadelphia Snelling's activity commenced in 1955 and involves the licensing of franchisees, under which individuals or corporations are permitted to operate similar employment agencies in various sections of the country under the trade name "Snelling and Snelling," using the techniques, office procedures, business forms, trade name, and after 1961 the trade mark "Fort Snelling."[1]

The consideration for such a license usually consists of an initial lump sum payment by the franchisee, plus a 7% commission or override on the gross monthly billings of the franchisee, of which 2% was originally allocated to the cost of a program of national advertising contracted for by Philadelphia Snelling. While the agreements under which franchisees have been licensed have varied, all of them contain stringent provisions restricting assignment, controlling the operation of the franchise, and insuring uniformity in stationery, forms and advertising.

On 5 September 1956, Philadelphia Snelling entered into a licensing agreement with Lionel Jacobs and James A. MacDougal, who paid $12,000 for a franchise which gave them "the exclusive right to use the name 'Snelling & Snelling'" in a territory:

> "Comprised of Baltimore, Maryland, and the surrounding counties * * * limited to the following Counties * * *: Queen Anne, Harford, Baltimore, Carroll, Howard, Anne Arundel and Kent; it being expressly understood between the parties that the

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[1] Philadelphia Snelling's registration of the service mark "Snelling and Snelling" and of the trade mark "Fort Snelling" with the U.S. Patent Office became effective on 20 June 1961 and 23 May 1961, respectively. Since this was subsequent to the agreement with the appellee it was conceded that state law was controlling in this case.

right to solicit applicants within said territory shall not be granted to any other Licensee."

The Jacobs-MacDougal effort proved unsuccessful, and the agreement was ultimately revoked by Philadelphia Snelling.

On 5 July 1960, Philadelphia Snelling entered into a licensing agreement with Snelling and Snelling of Baltimore, Inc., a Maryland corporation (Baltimore Snelling) of which Maynard Z. Drossner was president, treasurer and principal owner. Drossner had considered other franchises, including one in Atlantic City, and possibly another in Norristown, Pennsylvania (this testimony is disputed, however); knew that Philadelphia Snelling had licensed independent franchisees in the environs of Philadelphia; was aware of the failure of the Jacobs-MacDougal franchise; and knew also that their territory had included not only Baltimore City, but the surrounding counties.

The agreement with Baltimore Snelling contained two provisions which are particularly significant:

"1.(a) Snelling [Philadelphia Snelling] hereby grants to licensee [Baltimore Snelling] *the exclusive right to use the name* Snelling and Snelling and/or Snelling and Snelling of Baltimore, Inc. *in connection with one office only to be opened by licensee in Baltimore, Maryland.* Licensee shall not directly or indirectly establish an office or place of business, or move to any locations outside of such territory; nor shall licensee change its name without first obtaining the written consent of Snelling; nor shall licensee establish any branch or additioanl office without the written consent of Snelling. (Emphasis added.)

* * *

"9. * * * Licensee and shareholders [Baltimore Snelling] agree, when requested by Snelling [Philadelphia Snelling], to waive any and all objections licensee may legally have against the use of the

name 'Snelling and Snelling' in territories other than the territory granted to licensee herein."

Baltimore Snelling commenced operations in August, 1960, and was immediately successful. In 1962, Drossner wished to expand his business to include Towson, the county seat of Baltimore County, which is beyond the corporate limits of Baltimore City. When Drossner failed to reach agreement with Philadelphia Snelling on the amount of the franchise fee, he began to press the contention that Towson was a part of the metropolitan area within the contemplation of the parties when the licensing agreement of 5 July 1960 was signed, granting to Baltimore Snelling a franchise for Baltimore, Maryland. Philadelphia Snelling resisted this, relying on a literal interpretation of the agreement: *i.e.*, that Baltimore, Maryland, meant the corporate limits of Baltimore City.

Although the agreement with Baltimore Snelling limited it to one office in Baltimore, in 1963 Drossner wanted to open a second office in the heavily industrialized area in Highlandtown, which lies within the city's eastern boundary.

In 1963, Drossner and his wife formed a Maryland corporation, Snelling and Snelling of Highlandtown, Inc. (Highlandtown Snelling) and on 20 December 1963, Highlandtown Snelling entered into a licensing agreement with Philadelphia Snelling. While structured similarly to the agreement of 5 July 1960, which had been entered into with Baltimore Snelling, the contract was patently more sophisticated, and probably reflected Philadelphia Snelling's experience in the franchise field. Two provisions are of particular importance. Paragraph 1(a) omits the word "exclusive" and precisely limits the territory subject to the franchise:

"1. (a) [PHILADELPHIA] SNELLING hereby grants to Licensee [Highlandtown Snelling] the right to use the registered tradename 'Snelling and Snelling', the Fort Snelling registered trademark,[2] and to be

[2]See footnote 1, *supra*.

identified as a member of the Snelling and Snelling System in connection with the operation of a personnel consulting and employment agency business (herein sometimes called 'Licensee's business') to be conducted at an office located within the *following area: Bounded on the North by Pulaski Highway; on the East by Kresson Street; on the South by Eastern Avenue and on the West by Broadway. All located within the city of Baltimore."* (Emphasis added.)

For that portion of Paragraph 9 of Baltimore Snelling's agreement (which required Baltimore Snelling to waive any objections which it might legally have to the use of the Snelling name in other territories) Paragraph 1(c) was substituted in Highlandtown Snelling's agreement:

"1. (c) In connection with the operation of Licensee's business, Licensee shall use only the name 'Snelling and Snelling' and Licensee shall identify itself as a member of the Snelling and Snelling System, unless state law requires other or additional identification. SNELLING shall not grant to any other person, firm or corporation the right to use the name 'Snelling and Snelling' in connection with the operation of a personnel consulting and employment agency office within the area described in paragraph 1(a) hereof; *provided, however, that in the event SNELLING shall open offices or grant such right to others outside the described area but within the State where Licensee's office is located, Licensee does hereby release and waive any objection to the use of the name 'Snelling and Snelling' in connection therewith."* (Emphasis added.)

Drossner paid no franchise fee for Highlandtown. Robert O. Snelling, president of Philadelphia Snelling, testified that it was not his company's policy to exact a franchise fee for the opening of a second office in a territory already franchised, but because of Highlandtown's close proximity to the Essex-Dundalk industrial complex, he believed that there was a possibility that the value of a Dundalk-Essex

franchise might be prejudiced by the close proximity of another office. Consequently, Baltimore Snelling was required to amend its 1960 agreement, with the result that a 7% override with no allocation for national advertising was substituted for the earlier override of 5% and a 2% contribution to Philadelphia Snelling's national advertising budget.

On 28 January 1964, Drossner and Stanley Sackett entered into an agreement with Philadelphia Snelling for the licensing of an office in Towson. The franchise fee was $3,000; the agreement, substantially similar to Highlandtown Snelling's, except that the territory was described as "the city of Towson, Maryland, as of this date"; and on 16 March 1964, the agreement was assigned, with Philadelphia Snelling's consent, to Snelling and Snelling of Towson, Inc. (Towson Snelling). On 14 June 1965, Philadelphia Snelling again entered into a substantially similar agreement[3] with Snelling and Snelling of Glen Burnie, Inc. (Glen Burnie Snelling). A franchise fee of $2,600 was paid for a territory described as "the city limits of Glen Burnie, Maryland as of this date."

It is interesting to note that the ownership of the several franchises was not identical: Baltimore was owned by Drossner and his wife (50%) and Bert H. Cohen and his wife (50%); Highlandtown, entirely by Drossner and his wife; Towson, by Drossner (50%) and Sackett (50%); and Glen Burnie, by Drossner and his wife (50%) and Robert L. Cobaugh (50%). Because Snelling and Snelling appears in each of the corporate titles, Baltimore Snelling's consent was required in order for Highlandtown, Towson and Glen Burnie to be incorporated, as contemplated by Paragraph 9 of the agreement of 5 July 1960, and was given to the State Department of Assessments and Taxation.

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[3]This agreement provided for minimum annual overrides, however.

On 4 November 1965, Angelo R. Mascaro, the appellant here and one of the defendants below, entered into a licensing agreement with Philadelphia Snelling for a franchise in the Dundalk-Essex area of Baltimore County, for which he paid a franchise fee of $7,800. The territory was described in detail[4] and the franchise is hereafter referred to as "Dundalk-Essex Snelling." Except for the fact that the agreement was with an individual, it was substantially similar to Glen Burnie Snelling's, and included Paragraph 1(c).

Dundalk-Essex Snelling opened an office at 809 Eastern Boulevard in Baltimore County (and about 4 miles from Highlandtown Snelling) on 2 January 1966 and five days later Baltimore Snelling instituted suit.

The suit was brought in equity against Mascaro, the A. S. Abell Company (publishers of the Baltimore "Sun") and Chesapeake and Potomac Telephone Company,[5] on grounds of unfair competition. The bill of complaint alleged that Baltimore Snelling had since 17 August 1960, conducted business as an employment agency under the name "Snelling and Snelling" and had extensively advertised such name; that Drossner, the president, director and a stockholder in Baltimore Snelling was also an officer, director and shareholder in Towson Snelling, Highlandtown Snelling and Glen Burnie Snelling, also employment agencies trading under the same name with the consent of Baltimore Snelling. The bill further alleged that defendant, Angelo R. Mascaro had applied for an employment agency license indicating he would trade under the name "Snelling and Snelling" and had advertised under such name. The bill alleged that

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[4] "Outside of and East of Baltimore, In the State of Maryland, starting at the city limits of Baltimore East and South of Hwy. 40 to Hwy. 700 (Martin Blvd.), East and South of Hwy. 700 (Martin Blvd.) to Eastern Blvd. (Hwy. 150) South and East on Eastern Blvd. (Hwy. 150) to Wilson Blvd. (Hwy. 587) South and West of Wilson Blvd. (Hwy. 587) as per map attached."

[5] It was ultimately dismissed as to the latter two defendants.

Mascaro sought to mislead the general public and take advantage of the good-will in the name "Snelling and Snelling" that Baltimore Snelling allegedly had established by advertising. Claiming that its trade name had been damaged and that Mascaro was unfairly competing, Baltimore Snelling sought a temporary and permanent injunction restraining Mascaro from using the name "Snelling and Snelling." The bill also sought injunctions against The Abell Company and the Telephone Company restraining them from accepting advertisements from Mascaro under the name "Snelling and Snelling." An ex parte injunction dated 7 January 1966 was issued restraining the defendants as prayed but granting leave to move for a hearing within two days. On 15 January 1966, another order was signed extending the injunction for a period of ten days on the petition of Baltimore Snelling alleging that no service had as yet been made on Angelo Mascaro.

On 17 January 1966, Mascaro moved to dissolve the ex parte injunction, alleging that he was a licensee of the parent organization, Philadelphia Snelling, the same corporation that had licensed Baltimore Snelling. Mascaro contended that under his contract he had been granted the right to the use of the name "Snelling and Snelling" in connection with an office to be opened in the territory in Baltimore County described in his agreement.

After a hearing on Mascaro's motion, an interlocutory order was entered on 2 February 1966, dissolving the ex parte injunction and granting Mascaro the right to the use of the name "Snelling and Snelling" in connection with his office but requiring him to add as a suffix to his advertising and material distributed to the public, the words "of Dundalk-Essex A. R. Mascaro" in the same type as the words "Snelling and Snelling," and also the words "not connected with any other Snelling and Snelling office in this area."

Thereafter an answer was filed by Mascaro, and the case went to trial.

At trial Baltimore Snelling contended that through its prior use and advertising it had acquired the common law right to the exclusive use of the name "Snelling and Snelling" in the Baltimore metropolitan area. Mascaro contended that both he and Baltimore Snelling were licensees of Philadelphia Snelling, and that the parties' rights to the name were governed by their respective contracts with Philadelphia Snelling. By virtue of these contracts Mascaro said he had the right to open an office in the Dundalk-Essex territory as described in his contract and to use the name "Snelling and Snelling" in connection therewith and Baltimore Snelling's contract granted it the right to open an office in Baltimore, Maryland and use the name in connection therewith.

Baltimore Snelling replied, saying that its contract gave it the exclusive right to use the name in Baltimore City and Baltimore County.

In its opinion, the trial court found that Baltimore Snelling had no common law right to the use of the name Snelling and Snelling and that its right to use of the name derived from its license agreement with Philadelphia Snelling. It further found that the words "Baltimore, Maryland" in the contract between Baltimore Snelling and Philadelphia Snelling meant Baltimore City. However, the court went on to rule that by virtue of its contract, Baltimore Snelling had the exclusive right to the use of the name "Snelling and Snelling," in Baltimore City, and, therefore, while not denying defendant Mascaro the right to the use of the name "Snelling and Snelling" the court enjoined Mascaro from using the name unless he added a suffix to distinguish himself from Baltimore Snelling. Specifically, the court's decree enjoined Mascaro from using the name "Snelling and Snelling" in advertisements, materials distributed to the public, license applications and income tax returns

> "unless he includes the identifying designation 'of Dundalk-Essex, A. R. Mascaro', or '(Dundalk-Essex)'

'A. R. Mascaro', immediately following said name (and, in the advertising and listing referred to in (a) and (b) above, in the same size type, print or lettering as said name if the use of said name is in typed, printed, written or other graphic form) and the explanatory words 'not connected with any other Snelling and Snelling office in this (or 'the Baltimore') area, or '(not connected with any other Snelling and Snelling office)' in a prominent place therein, except that said Angelo R. Mascaro, one of the defendants, be and he is hereby relieved of the necessity of including said identifying designation and explanatory words in connection with the use of said name 'Snelling and Snelling' (or 'Snelling & Snelling') on the door to the office of his said employment agency business."

It is from this decree that Mascaro appealed, on the ground that the injunction was unwarranted, and Baltimore Snelling appealed, arguing that the injunction should have been absolute, that Baltimore Snelling's rights to the use of the name extended beyond Baltimore City, and that the injunction should have issued against the A. S. Abell Company and the Telephone Company.

One of the operational manuals prepared by Philadelphia Snelling for the use of its franchisees, and admitted as an exhibit at the trial below, contains the statement "Snelling and Snelling now humorously regards itself as the Howard Johnson of the personnel field." Even if spoken in jest, this is the core of the controversy. In 1960, when Baltimore Snelling received its franchise, Philadelphia had licensed between 40 and 50 franchisees. At the time this case came to trial, there were approximately 280 licensees in the United States, Canada and Argentina. The basic philosophy of the multiple franchise operation, amply evidenced by the terms of the licensing agreements, the operational manuals, and the form of both national and local advertising, is the creation of a monolithic system in which individual franchisees exchange personal identity for total anonymity, and wrap themselves in the cloak of "Snelling

and Snelling, Inc.," "Pioneers in Personnel," "Offices Coast to Coast," "The World's Largest Personnel System."[6]

Baltimore Snelling's display advertisement in the classified telephone directory typified this idea. In large type, it began:

"SNELLING AND SNELLING
The Largest and Most Comprehensive Personnel System In The Nation
BRANCH OFFICES - COAST TO COAST"

The advertisements which Baltimore Snelling inserted in the classified section of the Baltimore "Sun" followed the same format.

"SNELLING
AND
SNELLING

THE NATION'S LARGEST
PERSONNEL SYSTEM

200 offices coast to coast
Either office to serve you

Downtown
* * *
Towson
* * *
Glen Burnie
* * *
Highlandtown

[Then followed a list of job opportunities]

SNELLING & SNELLING"

Baltimore Snelling reads the provision of the license agreement of 5 July 1960, which grants

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[6]Mascaro's statement, "We have five offices in the Baltimore area," made in a telephone conversation with Drossner's secretary, about which Baltimore Snelling complains, is entirely consistent with this concept.

> "the exclusive right to use the name Snelling and Snelling and/or Snelling and Snelling of Baltimore, Inc. in connection with one office only to be opened by Licensee in Baltimore, Maryland"

to mean that Dundalk-Essex Snelling is prohibited from listing its telephone in the Baltimore telephone directory (which contains listings for subscribers in Dundalk and Essex); from advertising in Baltimore newspapers or on Baltimore radio and television stations and perhaps from advertising in newspapers which circulate in Baltimore or Baltimore County or on radio or television stations heard there. In its cross appeal, Baltimore Snelling challenges the lower court's decree because it falls short of this goal and fails to enjoin the A. S. Abell Company and the Telephone Company from accepting such advertising.

In support of this contention Baltimore Snelling insists that "Snelling and Snelling" has acquired a secondary meaning in Baltimore, by dint of Baltimore Snelling's extensive program of newspaper, radio and television advertising, costing "well over $100,000."

The chancellor concluded, and we agree, that Baltimore Snelling's use of the name "Snelling and Snelling" is based on its rights under the agreement of 5 July 1960, and not on a common law right, since the name acquired no secondary meaning as a result of Baltimore Snelling's use of it; that by contract, Baltimore Snelling was given the exclusive right to use the name "Snelling and Snelling" in connection with its office in Baltimore, Maryland; and that Baltimore, Maryland, as used in the agreement, means the corporate limits of Baltimore City.

We agree, however, with the appellant's argument, that the grant of an "exclusive" right to use the name "Snelling and Snelling" *in connection with one office in Baltimore* is not an unrestricted right. Philadelphia Snelling retained a right, and could assign to others the right, to use the name in Baltimore in ways not connected with the Baltimore office. To hold otherwise would give rise to the conclusion

that Baltimore Snelling might, if it wished, prevent Philadelphia Snelling from advertising in national magazines which circulated in Baltimore. This was clearly not intended by anyone.

The agreement of 5 July 1960 between Philadelphia Snelling and Baltimore Snelling provided that it was to "be construed in accordance with the laws of the Commonwealth of Pennsylvania." Where contract language is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids. *Sternbergh v. Brock*, 225 Pa. 279, 74 Atl. 166 (1909); *Kennedy v. Erkman*, 389 Pa. 651, 133 A.2d 550 (1957). Words are to be given their ordinary meaning *Pines Plaza Bowling, Inc. v. Rossview, Inc.*, 394 Pa. 124, 145 A.2d 672 (1958). However, if the language under consideration is ambiguous or uncertain a court must then determine the intention of the parties. In such a case a court may consider evidence of extrinsic factors: *i.e.*, negotiations of the parties, the circumstances surrounding execution of the contract, the parties' own construction of the contract and the conduct of the parties. *DeMoss v. Beryllium Corporation*, 358 Pa. 470, 58 A.2d 70 (1948); *Sternbergh v. Brock, supra; Kennedy v. Erkman, supra.*

The lower court also found that the licensing of Dundalk-Essex Snelling by Philadelphia Snelling permitted the invasion by one licensee of another's territory and that this invasion and the resulting confusion mounted up to unfair competition, entitling Baltimore Snelling to equitable relief. We agree that an element of confusion was introduced by the licensing of Dundalk-Essex Snelling. We concede that Dundalk-Essex Snelling gained access to the communications media located in Baltimore; but we do not agree that this was the degree of confusion or the sort of invasion which warrants the granting of relief, as a matter of law.

There is ample authority for the proposition that a trade name may seldom be licensed or assigned, except as an incident to the sale of a business or of its good will. *Gault v. Wagner*, 227 Md. 521, 525, 177 A.2d 691 (1962); Nims,

The Law of Unfair Competition and Trademarks, 4th Ed. 1947, §§ 17, 22. The reason for the rule is that such transactions are likely to break the continuity of business reputations on which customers are likely to rely. *Emerson Electric Mfg. Co. v. Emerson Radio & Phonograph Corp.*, 105 F.2d 908, 909 (2d Cir.), *Cert. Denied*, 308 U.S. 616 (1939), and result in confusion and deception. Nims, *supra*, § 17 at 86. There is an exception, however, "A trade name, like a trademark, may be assigned, as long as it remains associated with the same product or business with which it has become associated in the public mind * * * And upon the same conditions it may be licensed or lent, and its exclusive use may be resumed by its owner according to the terms of the lending." *Cardinal v. Taylor*, 302 Mass. 220, 19 N.E.2d 58, 59 (1939). For, as stated in *Corkran Hill & Co. v. A. H. Kuhlemann Co.*, 136 Md. 525, 533, 111 A.2d 471 (1920),

> "It may be enough that they [the articles] are manufactured for him, that he controls their production, or even that they pass through his hands in the course of trade, and that he gives to them the benefit of his reputation, or of his name and business style."

Or, as was said in *Gault v. Wagner*, 227 Md. 521, 526, 177 A.2d 691 (1962): "She [the licensor] is in a position to judge the quality of the work, and to exert a measure of control, through the right to terminate the license at will." *See also, Howard D. Johnson Co. v. Robbins Light, Inc.*, 328 Mass. 46, 101 N.E. 2d 348 (1951).

In a case involving a multiple-licensing arrangement similar to the one here involved, *Arthur Murray, Inc. v. Horst*, 110 F. Supp. 678, 679 (D. Mass. 1953), the court said:

> "In the light of the provisions of the agreement as set forth, it appears * * * that 'precautions were taken to insure that the Arthur Murray name would continue to indicate to the public what it had in the past, namely, a type of instruction conforming to

> the standards and methods of Arthur Murray'. It is plain we are not dealing here with a naked license."

See also, E. I. duPont de Nemours & Co. v. Celanese Corp., 167 F.2d 484, 489, 35 C.C.P.A. (Pat.), 1061, 3 A.L.R. 2d 1213 (1948).

Having satisfied ourselves that the granting of the license was valid; that the licensor, having retained broad control, could fix the conditions, delineate the territory, and recover its rights on breach or termination, *Howard D. Johnson Co. v. Robbins Light, Inc., supra,* we turn to a consideration of the element of unfair competition.

As Judge Delaplaine, speaking for this Court, said in *Edmondson Vil. Theatre, Inc. v. Einbinder,* 208 Md. 38, 43-44, 116 A.2d 377 (1955):

> "Like most doctrines of the common law, the law of unfair competition is an outgrowth of human experience. The rules relating to liability for harm caused by unfair trade practices developed from the established principles in the law of torts. These rules developed largely from the rule which imposes liability upon one who diverts custom from another to himself by fraudulent misrepresentation that the goods he is offering are the goods produced by the other. In England this type of fraud is commonly called 'passing off' or 'palming off' one's goods as those of another.
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> "The American Law Institute made the following comment in 3 *Restatement, Torts,* ch. 35, pages 539, 540, on this constantly developing doctrine:
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> 'The law has not yet developed a complete generalized standard for measuring trade practices like the standard of reasonable care in negligence. In part this is due to differing standards of commercial morality in the various industries; in part it is due to the fact that this branch of the law developed eclectically from the law dealing with

> the older wrongs which were not directly related to trade practices and competition. But the tendency of the law, both legislative and common, has been in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade.'"

A definitive discussion of recent developments in the field can be found in "Developments in the Law—Trade Marks and Unfair Competition" 68 Harv. L. Rev. 814 (1955).

Parkway Baking Company v. Freihofer Baking Co., 255 F.2d 641 (3d Cir. 1958) involved the question of competition between licensees in a multiple licensing arrangement. In that case, National Bakers Service, Inc., which owned a secret formula for baking low calorie bread and the trade mark "Hollywood", granted to Parkway an exclusive license to bake and sell Hollywood bread in a carefully defined area in Greater Philadelphia. Freihofer held the license for the territory, including the city of Allentown, immediately north of Parkway's. For a time, both Parkway and Freihofer sold to American Stores in their respective territories. American, desiring to deal with a single supplier, commenced to purchase its entire requirements from Parkway, which made deliveries to American's Philadelphia warehouse, although some of the bread was ultimately reshipped to American Stores in Freihofer's territory. Freihofer retaliated by making deliveries of Hollywood bread baked by him to a controlled distributor who took delivery of the bread in Allentown and redelivered to customers in Philadelphia. The court held that Parkway's sale to American in Philadelphia did not violate its license to bake and sell bread in Philadelphia, but that Freihofer's retaliatory sales, not being made in good faith, were a violation of its franchise. In so holding, the court construed the provisions of Parkway's license agreement in accordance with its literal terms[8] and

[8] While the court held that the contract was to be interpreted under the law of Illinois, it concluded that Pennsylvania law was the same.

concluded that there had been no invasion of Freihofer's territory.

The doctrine of confusion, relied on by the lower court in the case before us is of relatively recent development. Originally, unfair competition consisted of "passing off" or "palming off" one's goods as those of another through the practice of deception. As the law developed, proof of fraudulent deception was no longer essential for relief, and this is the Maryland rule. *Edmondson Vil. Theatre, Inc. v. Einbinder, supra,* and at the same time, the earlier cases, holding that lack of competition between the parties was a defense, were being overruled. *Compare Borden Ice Cream Co. v. Borden's Condensed Milk Co.,* 201 F. 510, 514 (7th Cir. 1912), *with Ward Baking Co. v. Potter-Wrightington,* 298 F. 398 (1st Cir. 1924).

In the course of this development, confusion came to be recognized as a ground for equitable relief, even in the absence of deception or direct competition. For the complaining party to obtain injunctive relief on grounds of confusion, in cases where a trade name is at issue, the existence of a secondary meaning must be established, *National Shoe Stores Co. v. National Shoes of New York, Inc.,* 213 Md. 328, 131 A.2d 909 (1957); *Baltimore Bedding Corp. v. Moses,* 182 Md. 229, 34 A.2d 338 (1943); Nims, *op. cit.,* § 334; Annot. 150 A.L.R. 1067. In the absence of a finding of secondary meaning, there must be proof of deception. *National Shoe Stores Co. v. National Shoes of New York, Inc., supra; Drive It Yourself Co. v. North,* 148 Md. 609, 614, 130 A. 57 (1925); *Afro-American Owls v. Talbot,* 123 Md. 465, 91 A. 570 (1914); Annot. 150 A.L.R. 1067. In the case before us, the court below found no evidence that the name "Snelling and Snelling" had acquired a secondary meaning in consequence of its use by Baltimore Snelling. With this we agree, since should we conclude that a secondary meaning had been developed, it follows that it had been developed by Philadelphia Snelling, and that Baltimore Snelling and Dundalk-Essex Snelling were derivative beneficiaries of the secondary

meaning by virtue of their license agreements. While the lower court found that "destructive competition" and "confusion" existed, there was no direct finding of fraud or deception, nor would such a finding have been supported by the evidence.

A multiple franchise operation of the sort conducted by Philadelphia Snelling is a comparative newcomer to the business world. Philadelphia Snelling cites Howard Johnson as comparable, but others readily suggest themselves: Quality Court, Holiday Inns, Arthur Murray Dance Studios, and Sunkist Oranges are typical.

Adopting the characterization contained in the opinion in *Quality Courts United, Inc. v. Quality Courts, Inc.*, 140 F. Supp. 341 (M.D.Pa. 1956), "Snelling and Snelling," like "Quality Courts" could be regarded as a collective trade name,[9] analogous to the collective marks[10] registerable under the Lanham Act, 15 U.S.C.A. 1054, which are used in connection with the services of any person other than the owner to certify the quality and characteristics of the services. *See also, Huber Baking Company v. Stroehmann Bros. Co.*, 252 F.2d 945 (2d Cir.), *Cert. Denied*, 358 U.S. 829 (1958).

While the contractual arrangements and legal relationships between the multiple licensees may vary, all multiple franchise operations have one element in common—the complete subordination of the identity of the individual owner or operator to the group image. The "confusion" of which Baltimore Snelling complains is not only a natural result, but may even be a desired product of the structure, and must be sharply differentiated from the situations considered by this Court in *A. Weiskittel & Son Co. v. Harry C. Weiskittel Co.*, 167 Md. 306, 173 A. 48 (1934) and *Neubert v. Neu-*

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[9]It was registered as a service mark in 1961.

[10]These were unknown at common law. Nims, *supra*, § 22, at 130. *But cf.* Keebler Weyl Baking Co. v. J. S. Ivins' Son, Inc. 7 F. Supp. 211 (E.D.Pa. 1934).

bert, 163 Md. 172, 161 A. 16 (1932). No better example of the monolithic facade of the Snelling "system" can be found than in Drossner's own operation. His advertising would leave the uninformed to believe that Baltimore, Highlandtown, Towson and Glen Burnie are integral parts of a nation-wide system, which they are, for there is nowhere in the advertising an intimation that each of the four offices is a separately organized and owned business entity.

In recent times, the doctrine of unclean hands which Dundalk-Essex Snelling asserted in its answer has been regarded as a doctrine applied for the protection of the court and not of the parties, *Space Aero Products Co. v. R. E. Darling Co., supra*, 238 Md. at 120, and is seldom a defense available in an unfair competition action. Chafee, "Coming Into Equity With Clean Hands," 47 Michigan L. Rev. 1065, 1076-1080 (1949). The case which denied relief to the manufacturer of "Balm of Thousand Flowers" soap, which contained no flowers;[11] to the formulator of "California Fig Syrup," which contained no figs;[12] and the probbem faced by this Court in the He-No Tea case, where a blend of tea sold as "the kind of tea the Chinese drink" was shown to be unknown in China,[13] in today's world would be resolved on broader equitable grounds. As Judge Learned Hand said in the Second Circuit's opinion in *Dwinell-Wright Co. v. White House Milk Co.*, 132 F.2d 822, 825 (2d Cir. 1943): "Here, as often, equity does not seek for general principles, but weighs the opposed interests in the scales of conscience and fair dealing." Putting this another way, equitable estoppel may bar the relief sought. In the *White House* case, the complainant knew of the defendant's use of the brand name on its cans of evaporated milk, and was selling White House tea and coffee to the defendant for resale. In

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[11] Fetridge v. Wells, 13 How. (N.Y. Pract.) 385, 389 (Superior Ct. 1857).

[12] Worden v. California Fig Syrup Co., 187 U.S. 516, 528 (1903).

[13] Kenny v. Gillet, 70 Md. 574, 17 A. 499 (1889).

denying relief, the court said " * * * the owner may have so conducted himself as impliedly to assure the newcomer that he does not object, and the newcomer may have built upon that assurance." 132 F.2d at 825.

Or, as was said in *Holly Hill Citrus Growers' Assn. v. Holly Hill Fruit Products, Inc.*, 75 F.2d 13, 17 (5th Cir. 1935):

> "There is a kind of evidential estoppel which, though it may not amount to a complete estoppel in pais, is raised when persons who have spoken or acted one way under one set of circumstances, and with one objective in mind, undertake under other circumstances and when their objective has changed, to testimonially give a different color to what they formerly said and did."

We think that principle applies here. Drossner is estopped from challenging the validity of a licensing system which he used to his own advantage when he obtained the Towson and Glen Burnie franchises, and from attempting to impose upon Mascaro limitations with respect to access to communications media which he did not assert against Towson and Glen Burnie. To permit him to do so would be to sanction the weaving of the very web of broader exclusivity which he failed to achieve by contract. Baltimore Snelling's bill of complaint should have been dismissed.

DECREE REVERSED; INJUNCTION VACATED; COSTS TO BE PAID BY THE APPELLEE.

APPENDIX B

DISSENTING OPINION IN THE COURT OF APPEALS OF MARYLAND[2]

[Caption Omitted in Printing]

HAMMOND, C.J.
HORNEY
MARBURY
BARNES
SINGLEY,
JJ.

DISSENTING OPINION BY BARNES, J.

Filed: May 31, 1968

Barnes, J., dissenting:

I dissent because in my opinion (1) the Chancellor's construction of the licensing agreement of July 5, 1960, was correct, and (2) the defense of estoppel, although sound as an abstract principle, is not applicable and, in any event, is not available in this case because it was not raised in the lower court and was not briefed by the appellant in this appeal.

1.

The Chancellor, in my opinion, correctly construed the licensing agreement of July 5, 1960, as an agreement by Philadelphia Snelling to grant to Baltimore Snelling the *exclusive* right to use the name Snelling & Snelling in Baltimore City. This exclusive right was to be used in connection with one office only which was to be opened by Baltimore Snelling in Baltimore City. As I read paragraph 1(a) this is what the licensing agreement states. This is confirmed, in my opinion, by the provisions of paragraph 9 of the licensing agreement whereby Baltimore Snelling agreed when

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[2]This opinion appears at pages 25-34 of the certified transcript of record (R. 25-34) herein.

requested by Philadelphia Snelling to waive objections which Baltimore Snelling might legally have against the use of the name "Snelling and Snelling" in territories *other than the territory* granted to Baltimore Snelling.

It is well established that the primary source for determining the intention of the parties to a contract is the language used by the parties. *Kelley Construction Co. v. Washington Suburban Sanitary District,* 247 Md. 241, 230 A.2d 672 (1967); *Cadem v. Nanna,* 243 Md. 536, 221 A.2d 703 (1966). The words of the contract are to be understood in their plain, ordinary and popular sense, unless they have acquired a peculiar sense by trade usage or for some other cause. *Highley v. Phillips,* 176 Md. 463, 5 A.2d 824 (1939). It is only when the words of the contract, used in their ordinary sense, are vague, doubtful or ambiguous, that extrinsic evidence is admissible to determine the intention of the parties. *Coopersmith v. Isherwood,* 219 Md. 455, 150 A.2d 243 (1959). As pointed out in the majority opinion, the Pennsylvania law is to the same effect.

The Chancellor concluded that Baltimore Snelling acquired the legal right, by the terms of the licensing agreement, to the *exclusive* use of the name "Snelling and Snelling" in Baltimore City in connection with its office located in that area, that the operation of Mascaro, by soliciting and advertising, could not be effectively confined within his Dundalk-Essex franchise area without invading some sections of Baltimore City, and that this operation violated Baltimore Snelling's exclusive right to use the name "Snelling and Snelling" in its franchise area. In my opinion the Chancellor's conclusion was correct and carries into effect the intention of the parties to the licensing agreement as disclosed by the words of the contract itself. The purpose of the exclusive grant was to protect the franchisee from competition within the franchise area and this was a lawful provision.

The majority indicates that the exclusive right to use the name in Baltimore City in connection with one office in that City "is not an unrestricted right" and that "Philadel-

phia Snelling retained a right and could assign to others the right to use the name in Baltimore in ways not connected with the Baltimore office. To hold otherwise would give rise to the conclusion that Baltimore Snelling might, if it wished, prevent Philadelphia Snelling from advertising in magazines which circulated in Baltimore.". It was further stated "This was clearly not intended by any one." With great respect, this appears to me to beg the question. The language of the contract gives an unrestricted right against those who can *compete* with Baltimore Snelling, not against national advertising generally or advertising by franchisees who geographically cannot compete with Baltimore Snelling as a practical matter. There is no contention that Philadelphia Snelling could grant another franchise for another office to someone other than Baltimore Snelling in Baltimore City. It seems clear that Baltimore Snelling then has the exclusive right to use the Snelling name in Baltimore City in connection with that one office and no one else can be granted any right to use the name in Baltimore City in competition with Baltimore Snelling. The conclusion of paragraph 1(a) provides:

> "Licensee (Baltimore Snelling) shall not directly or indirectly establish an office or place of business, or move to any locations outside of such territory; nor shall licensee [Baltimore Snelling] change its name without obtaining the written consent of Snelling [Philadelphia Snelling]; nor shall licensee [Baltimore Snelling] establish any branch or additional office without the written consent of Snelling [Philadelphia Snelling]."

This provision indicates that there are two prohibitions on the activities of Baltimore Snelling, (1) that only one office will be maintained that one in its *territory*, and (2) that there will be no change in its *name*. Paragraph 9 provides for waiver by Baltimore Snelling in territories *other than* the territory granted to Baltimore Snelling. This language clearly indicates that the territory granted to Baltimore Snelling is Baltimore City (it is the only *territory* mentioned in

paragraph 1) and there is no provision that there will be any waiver of objection to the use of the name "Snelling and Snelling" in *that territory*. This language confirms the exclusive nature of the grant to Baltimore Snelling.

Assuming, *arguendo*, that the licensing agreement is ambiguous, the extrinsic evidence, in my opinion, confirms the Chancellor's construction of the contract. When the licensing agreement was negotiated, the prior franchisees in the Baltimore area had failed badly in their operation, leaving a collection of unpaid bills and ill will behind them. The *name* "Snelling and Snelling" was at that point a liability rather than an asset. In short, the situation gave rise to a franchisee's "market," as it were, and Philadelphia Snelling was obliged to give Baltimore Snelling a licensing agreement most beneficial to the franchisee and at a small license payment in order to obtain a competent and qualified operator who would enter the unfortunate situation in Baltimore.

In addition to the specific situation in the Baltimore area, Philadelphia Snelling in 1960 had not enlarged its licensing operations to the substantial size it enjoys at the present time. Here again it was necessary to give favorable licensing agreements to its franchisees in order to build up its business at that time. It is significant that after the situation in Baltimore was rectified and Philadelphia Snelling's business had substantially expanded, a *different* form of contract from which the word "exclusive" was removed was used by Philadelphia Snelling, and more substantial original license payments were required. It seems clear that Philadelphia Snelling believed that there was a substantial legal difference between a licensing agreement containing the word "exclusive" and one from which that word was excluded. It is unreasonable to suppose that Baltimore Snelling would have proceeded to make the very substantial payments for advertising and other promotional items[1] if it had not believed that it had the exclusive right for which it had successfully bargained.

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[1] The testimony indicates that amounts up to $118,000.00 per year were spent on these items.

Then too, the licensing agreement of July 5, 1960, was prepared by Philadelphia Snelling. It is well settled that in the event of ambiguity in the contract, it is to be construed against the party preparing it. *Hughes & Co. v. Pioneer*, 230 Md. 36, 185 A.2d 383 (1962). Applying this maxim of construction to the licensing agreement, the ambiguity would be resolved against Philadelphia Snelling and the Chancellor's construction sustained.

2.

In the majority opinion, as an alternative ground for reversing the Chancellor's decree it is indicated that Baltimore Snelling is equitably estopped from challenging the validity of the licensing system which Drossner "used to his own advantage when he obtained the Towson and Glen Burnie franchises and from attempting to impose upon Mascaro limitations with respect to communications media he did not assert against Towson and Glen Burnie." Although the basic principle of estoppel is sound in a proper case, in my opinion, it is not applicable in the present case, as Drossner was *himself one of the principals* in the Towson and Glen Burnie franchises. The granting of these franchises was not injurious to the exclusive franchise granted to Baltimore Snelling inasmuch as a substantial part of the profits of their operation accrued to the principal in Baltimore Snelling. The obtention of the Glen Burnie and Towson franchises might possibly establish an equitable estoppel, prima facie, against Drossner in his contention that Baltimore Snelling's franchise included areas outside of Baltimore City, but it would not, in my opinion, operate as an estoppel to insist on the exclusive franchise as against Mascaro, a competitor. More importantly, it would seem that merely because Drossner permitted one person to infringe his exclusive franchise, he would not be prevented from enforcing that franchise against another infringement by a different person.

Assuming for the argument that the estoppel would otherwise be effective against Drossner, in my opinion the estoppel is not available to Mascaro in this case because it

was not raised, considered or passed upon by the Chancellor in the trial court and was not briefed or argued before us on this appeal.

It is indicated in the majority opinion that Mascaro in his answer to the bill of complaint asserted the defense that the plaintiff was guilty of "unclean hands" and the inference is that this affirmative defense sufficiently raised the question of estoppel. In my opinion, the raising of this affirmative defense does not raise the question of estoppel aganst Drossner by his acquisition as one of the principals of the Towson and Glen Burnie franchises. Paragraph 20 of the Mascaro answer alleges:

> "20. Further answering, Complainant is guilty of unclean hands in that the Bill of Complaint, which prayed under oath an ex parte injunction which was successfully obtained and then dissolved on motion of Defendant, fails to make a full and frank disclosure of all the facts, to wit, that both Complainant and Defendant are licensees of Snelling and Snelling, Inc., owners of the registered trade name "Snelling and Snelling" by virtue of contracts dated July 5th, 1960, and November 4th, 1965 respectively."

There is nothing alleged in paragraph 20 to suggest any estoppel of Drossner by having acquired, as one of the principals, the Towson and Glen Burnie franchises. The reference in paragraph 20 is to licenses acquired under the licensing agreements of Baltimore Snelling and Mascaro, dated July 5, 1960 and November 4, 1965 respectively. The Chancellor does not mention or pass upon any estoppel point in his written opinion and there is nothing concerning it in the final decree. The point is not mentioned in the briefs of the respective parties and the cases cited on this point by the majority are not cited. There was no argument before us on the point.

Under these circumstances the point is not available to Mascaro as a ground for reversal in this case. Maryland Rule 885 provides that this Court "will not ordinarily de-

cide any point or question which does not plainly appear by the record to have been decided by the lower court." In my opinion, the point was not presented to the lower court and I see no reason to decide the point here. See *Elko v. Elko*, 187 Md. 161, 49 A.2d 441, 168 A.L.R. 256 (1946).

Then too, we have rather consistently held that even if a point were raised and decided by the lower court, it will be deemed to be waived on appeal if the point is not briefed in this Court. *Harmon v. State Road Commission*, 242 Md. 24, 217 A.2d 513 (1966); *Meyers v. Chief of Baltimore County Fire Bureau*, 237 Md. 583, 207 A.2d 467 (1965). For this additional reason, the estoppel point is not available to Mascaro in this case as a ground for the reversal of the Chancellor's decree.

I would affirm the decree.

APPENDIX C

[Filed June 26, 1968, "Denied" June 28, 1968]

MOTION FOR REARGUMENT[3]

Now comes the appellee and cross-appellant, Snelling and Snelling of Baltimore, Inc., and respectfully moves the Court to grant reargument in this cause.

In these appeals, the appellant, Angelo R. Mascaro (referred to in the opinions herein as "Mascaro" or as "Dundalk-Essex Snelling" and hence hereinafter referred to in the same manner), sought to set aside an "explanatory phrase" injunction issued against him by the Chancellor below, enjoining him from using in Baltimore City the trade name "Snelling and Snelling" in connection with his employment agency business conducted from an office in Dundalk, in Baltimore County, adjacent to Baltimore City, unless he accompanied such use by a legend distinguishing his business from that of Snelling and Snelling of Baltimore, Inc. (referred to in the opinions herein as "Baltimore Snelling" and hence hereinafter referred to in the same manner), a prior user in Baltimore City of the name in issue, and Baltimore Snelling sought, in part, to extend the Chancellor's injunction to encompass an absolute prohibition against any use of the disputed name in Baltimore City by Mascaro, even if accompanied by explanatory language.

The Chancellor decided the issues below by construing a licensing agreement between Baltimore Snelling, as licensee, and Snelling and Snelling, Inc., a Pennsylvania corporation (referred to in the opinions herein as "Philadelphia Snelling" and hence hereinafter referred to in the same manner), as licensor. The Chancellor concerned himself particularly with construction of the portion of Baltimore Snelling's contract, contained in paragraph 1.(a) thereof, which granted to Baltimore Snelling

> "***the exclusive right to use the name Snelling and Snelling***in connection with one office only to

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[3]This motion appears at pages 35-47 of the certified transcript of record (R. 35-47) herein. The disposition of the motion is endorsed on the face thereof (at R. 35).

be opened***in Baltimore, Maryland." (Majority opinion, p. 3)

The Chancellor interpreted that language as granting to Baltimore Snelling the exclusive right to use the name involved in Baltimore City, such exclusive right to be used in connection with one office only in Baltimore City. The Chancellor found that Mascaro, as licensee under another agreement with Philadelphia Snelling, was by using the name "Snelling and Snelling" in Baltimore City unfairly competing with Baltimore Snelling. The Chancellor found that Mascaro's activities in Baltimore City, as, for instance, his advertising, though carried on from his office in Dundalk, infringed upon Baltimore Snelling's exclusive right. The Chancellor hence afforded Baltimore Snelling injunctive relief.

The majority of the Court, over the dissent of Judge Barnes, disagreed with the Chancellor's construction and reversed his decree. The majority of the Court held that Baltimore Snelling's "exclusive right to use the name" Snelling and Snelling "in connection with one office only" in Baltimore City was not really an exclusive right at all, not even so long as such use was connected with one office only in Baltimore City. The majority of the Court held, rather, that Baltimore Snelling's right was not exclusive, in the sense at least that it was "not an unrestricted right" (Majority Opinion, p. 13) and that Philadelphia Snelling hence retained "the right to use the name in Baltimore in ways not connected with the Baltimore office" (Majority Opinion, p. 13) and could assign that right to others, that is, in the instant cause, to Mascaro. The majority of the Court postulated as an additional premise for reversing the Chancellor's decree that Baltimore Snelling was precluded from securing the relief which it sought by an "equitable estoppel" (Majority Opinion, p. 20) said to operate against it because Maynard Z. Drossner (referred to in the opinions herein as "Drossner" and hence hereinafter referred to in the same manner), Baltimore Snelling's principal owner, had procured three other franchises ("Highlandtown Snelling", "Towson Snelling" and

"Glen Burnie Snelling"), in addition to Baltimore, from Philadelphia Snelling and Baltimore Snelling should hence not be heard to object because Mascaro had obtained Dundalk-Essex Snelling from the same source under the same system. Judge Barnes, in his dissent, said that in his opinion the Chancellor's construction of Baltimore Snelling's contract had been correct and that the estoppel point interposed by the majority of the Court was not properly in the case, since it had not been decided below, nor briefed nor argued in these appeals. He announced that he would affirm the Chancellor's decree.

THE GROUNDS FOR THIS MOTION

In addition to the reasons why the Chancellor's decree should at least have been affirmed by the Court, set out in its respective briefs as appellee and as cross-appellant herein, none of which Baltimore Snelling proposes to repeat herein, but upon all of which it continues to rely, Baltimore Snelling respectfully assigns as grounds for this motion and as additional reasons why reargument should be granted in this cause: (1) that the majority of the Court misconstrued the contract between Baltimore Snelling and Philadelphia Snelling and (2) that the majority of the Court improperly applied the estoppel defense against Baltimore Snelling, especially since the majority relied on that defense as a basis of decision without first affording Baltimore Snelling any opportunity to be heard thereon.

1. The majority of the Court misconstrued the contract between Baltimore Snelling and Philadelphia Snelling.

On the issue of the proper construction of the operative language of Baltimore Snelling's contract with Philadelphia Snelling, which granted to Baltimore Snelling "the exclusive right to use the name Snelling and Snelling***in connection with one office only***in Baltimore, Maryland" (Majority Opinion, p. 3), Baltimore Snelling respectfully submits that the necessary effect of the interpretation put upon that language by the majority of the Court is to place the Court in the position of having written a new contract for the parties,

one entirely different from that which they made for themselves. The difference arises particularly in that the parties to the contract appear to have agreed that Baltimore Snelling was to have the exclusive use of the name Snelling and Snelling "in connection with one office *only*" (emphasis added) in Baltimore, Maryland, while the majority of the Court appears to have revamped that agreement into one allowing Baltimore Snelling the exclusive use of the name in issue *only* "in connection with one office" in Baltimore, Maryland, a very grave and substantial change indeed.

If one allows the language quoted as restrictive a scope as may reasonably be attributed to it, still that language grants to Baltimore Snelling not "the exclusive right" to have "one office only" in Baltimore, Maryland, but the exclusive right "to use the name Snelling and Snelling" in Baltimore, Maryland. The only limitation on that right appearing from the language of the contract is that the use of the name must in some manner be connected with, that is be carried on "in connection with one office only***in Baltimore, Maryland". Certainly everything in the evidence in this cause establishes beyond any question whatsoever that the use made of the name Snelling and Snelling in Baltimore City by Baltimore Snelling was in fact "in connection with one office only" opened and conducted by Baltimore Snelling in Baltimore City. Baltimore Snelling hence urges that it has fulfilled all requirements reasonably to be elicited from the language used in its contract with Philadelphia Snelling. It should then be entitled to receive the benefit of the consideration for which it bargained and for which, as the record shows, it paid quite dearly, viz. the benefit of the *exclusive* use of the name in issue in connection with the one office which it maintains in Baltimore City.

Baltimore Snelling respectfully submits that the construction placed upon the quoted language by the majority of the Court totally changes the undertakings of the parties to the contract involved and entirely rewrites the most critical portion of the contract. It changes the contract from one

which grants to Baltimore Snelling "the exclusive right to use the name Snelling and Snelling and/or Snelling and Snelling of Baltimore, Inc. in connection with one office *only* to be opened by licensee (Baltimore Snelling) in Baltimore, Maryland" (Majority Opinion, p. 3: emphasis added) to one which grants to Baltimore Snelling "the exclusive right to use the name Snelling and Snelling and/or Snelling and Snelling of Baltimore, Inc. (*only*) in connection with one office ***to be opened by licensee (Baltimore Snelling) in Baltimore, Maryland" (Majority Opinion, p. 3; word in bracket and emphasis added). The transposition of the word "only" is the inescapable result of the interpretation placed upon the language quoted by the majority of the Court. The result is something vastly different from the result which the parties to the contract in question ever agreed upon or even contemplated.

Baltimore Snelling respectfully submits that the majority of the Court should not have rewritten its contract with Philadelphia Snelling. That the majority of the Court did so, however, is clear from the statement made in the majority opinion that

> "***the grant of an 'exclusive' right to use the name 'Snelling and Snelling' *in connection with one office in Baltimore* is not an unrestricted right. Philadelphia Snelling retained a right, and could assign to others the right, to use the name in Baltimore in ways not connected with the Baltimore office." (Majority Opinion, pp. 12-13) (Emphasis is the Court's.)

Baltimore Snelling respectfully submits that the aforegoing clearly amounts to a statement that Baltimore Snelling's acknowledged (even by the majority of the Court) "exclusive right" is one existing *only* in connection with one office in Baltimore, rather than one existing in connection with one office *only* in Baltimore. The latter is what Baltimore Snelling and Philadelphia Snelling agreed was to be the case and is what the Chancellor found their agreement to be (and Baltimore Snelling submits that his finding is supported by the record); the former is what the opinion of the majority

of the Court imposes upon Baltimore Snelling, contrary to its agreement.

And in doing that the majority of the Court appears to have chosen not to give effect to the salutary and well settled rule, referred to in Baltimore Snelling's brief as appellee herein and alluded to by Judge Barnes in his dissenting opinion "that in the event of ambiguity in the contract, it is to be construed against the party preparing it". (Dissenting Opinion, p. 6) Is the language of paragraph 1.(a) of Baltimore Snelling's contract so crystal clear and does it so compellingly and necessarily lead solely to the construction put upon it by the majority of the Court as to obviate entirely the construction placed upon it by the Chancellor below and by Judge Barnes here? With all deference to the opinion of the majority of the Court, Baltimore Snelling respectfully but strenuously urges that, if the language involved is clear at all, it clearly establishes not the interpretation put upon it by the majority of the Court, but the sense and meaning afforded to it by the Chancellor below and by the dissenting member of the Court here.

As Baltimore Snelling noted in its briefs and arguments earlier in this cause, the construction for which it contends and the construction which was adopted by the Chancellor and by Judge Barnes is just as readily available from the language of the contract as is the one contended for by Mascaro and adopted by the majority of the Court. But, Baltimore Snelling respectfully suggests, that very circumstance results in the existence of ambiguity in the contract. See, for instance, Webster's definition of "ambiguity" which reads in part, as follows:

> "*ambiguity****2. Ambiguousness in meaning arising from language admitting of more than one interpretation; ***" (Webster's New International Dictionary, Second Edition, Unabridged, p. 81).

See also Black's Law Dictionary, Second Edition, 1910, p. 64, Verbo "Ambiguity". Baltimore Snelling respectfully submits that it is entitled to the benefit of the more favor-

able to it of the two at least equally plausible constructions available from the patently ambiguous language of the contract provision in issue in this cause and that failure of the majority of the Court to recognize, deal with or mention the applicability vel non of the rule requiring such an approach to the language involved warrants reargument.

2. The majority of the Court improperly applied the estoppel defense against Baltimore Snelling.

As a basis for reversing the Chancellor's decree the majority of the Court also indicates that Baltimore Snelling is equitably estopped from attacking the licensing system which resulted in Mascaro's advent upon the scene in competition *in Baltimore City* with Baltimore Snelling. On this point the majority of the Court premises its position on a finding that:

> "***Drossner is estopped from challenging the validity of the licensing system which he used to his own advantage when he obtained the Towson and Glen Burnie franchises, and from attempting to impose upon Mascaro limitations with respect to access to communications media which he did not assert against Towson and Glen Burnie. To permit him to do so would be to sanction the weaving of the very web of broader exclusivity which he failed to achieve by contract. ***" (Majority Opinion, p. 21)

Aside from the reasons (all of which, without repeating them herein, Baltimore Snelling adopts) why the estoppel ground is not properly applicable to or available in this cause, advanced by Judge Barnes in his dissenting opinion, Baltimore Snelling respectfully submits that the action of the majority of the Court in deciding the issues herein involved even in part on a basis, i.e. the estoppel ground, as to which Baltimore Snelling was not afforded any opportunity to be heard is also a clear violation of the provisions of the Declaration of Rights, Article 23, Constitution of Maryland and of those of the Equal Protection and Due

Process Clauses of the Fourteenth Amendment to the Constitution of the United States and is repugnant to and deprives Baltimore Snelling of substantial rights and benefits guaranteed by those constitutional provisions and by each of them. That fundemental fairness which is requisite to the validity of an adversary proceeding in any court and which is essential to "due process" and implicit in the "law of the land" must include an adequate opportunity to be heard on an issue on which judgment is based. See the constitutional provisions cited. Cf. *Travelers Indem. Co. v. Nationwide Const. Corp.*, 244 Md. 401, 224 A.2d 285 (1966); *Burns v. Mayor and City Council of Midland*, 247 Md. 548, 234 A.2d 162 (1967); *Goodman v. Swenson*, 192 F.2d 669, C.A. Md., (1952).

Baltimore Snelling has no accurate means of measuring the importance of the estoppel premise to the process by which the majority of the Court reached the result attained in the instant cause, but Baltimore Snelling must assume that the estoppel issue had a substantial effect, especially since it is set out in the majority opinion and developed at some length therein. Certainly it had some effect. Otherwise no reason for raising it, much less discussing it in the opinion, would appear. And it is, of course, the fact that Baltimore Snelling had no opportunity whatsoever to argue the estoppel point, or to present to the Court any positions or authorities it might believe to be favorable to its views, since neither the existence nor efficacy of any estoppel defense was dealt with below, argued in Mascaro's briefs, spoken of in oral argument here or in any manner even mentioned in this cause prior to its interjection in the majority opinion.

Had it been afforded an opportunity, Baltimore Snelling might have made effective arguments. Some authority appears to exist to the effect that an estoppel defense, or defense akin to "equitable estoppel", may not be so readily available in circumstances similar to those prevailing in the instant cause. There is not, for instance, any showing in the record in this cause of an "unconscientious and inequitable

assertion of rights" by Baltimore Snelling, such as is referred to in *Johnson Lumber Co. v. Magruder*, 218 Md. 440, 147 A.2d 208, 212 (1958), as being the sort of conduct which equitable estoppel "was educed to prevent" (Id.). And see the discussion regarding equitable estoppel and its proper bases set out in *Travelers Indem. Co. v. Nationwide Const. Corp.*, supra, 224 A.2d 285, 292-294. Nothing whatever appears in the record to support any inference that anything done by Baltimore Snelling with respect to obtention or exercise of its franchise was in any way inconsistent, or had prejudiced or misled Mascaro. (The very activities relied upon by the majority of the Court as a basis for the estoppel directed against Baltimore Snelling are those of *Drossner* (Majority Opinion, p. 21), not Baltimore Snelling, and this despite that the majority earlier went to some length to establish that the ownership of the several franchises in which Drossner held financial interests was diverse rather than identical (Majority Opinion, pp. 5-6). Now, on the estoppel point, the majority charges Baltimore Snelling with what it considers to be the onus of Drossner's acts, even though Baltimore Snelling is the interested litigant, not Drossner, who is no more a party to the cause than is Philadelphia Snelling.) The presence of some such factors would seem essential to imposition of any estoppel against Baltimore Snelling. And see, regarding the availability vel non of a defense similar to estoppel as between a licensor and its licensed dealers, *Perma Life Mufflers, Inc. v. International Parts Corp.*, U.S. , 36 LW 4571 (1968) (No. 733, October Term, 1967, filed June 10, 1968), in which the Supreme Court, reversing the Court of Appeals for the Seventh Circuit, which had affirmed the District Court, held that the doctrine known by the Latin phrase *in pari delicto* was not a bar to a private antitrust action brought by licensees of Midas, Inc., operators of "Midas Muffler Shops", against their licensor and International Parts Corp., its parent organization, charging restraint of trade and suppression of competition. The Supreme Court noted that it found itself "in complete disagreement with the Court of Appeals" (36 LW

4572). It set out the position of the Court of Appeals as follows:

> "The Court of Appeals, agreeing with the District Court, held the suit barred because petitioners were *in pari delicto*. The Court noted that each of the petitioners had enthusiastically sought to acquire a Midas franchise with full knowledge of these provisions and had 'solemnly subscribed' to the agreement containing the restrictive terms. Petitioners had all made enormous profits as Midas dealers, had eagerly sought to acquire additional franchises, and had voluntarily entered into additional franchise agreements, all while fully aware of the restrictions they now challenge. Under these circumstances, the Court of Appeals concluded, '(i)t would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine.' 376 F.2d, at 699." (36 LW 4572)

The position of the Court of Appeals for the Seventh Circuit, reversed by the Supreme Court, is not dissimilar, with respect to the circumstances under which it erroneously held the *pari delicto* doctrine to be applicable, from the position of the majority of this Court, with respect to the applicability of the equitable estoppel doctrine to Baltimore Snelling, as noted in the majority opinion, viz.:

> "***Drossner is estopped from challenging the validity of a licensing system which he used to his own advantage when he obtained the Towson and Glen Burnie Franchises, and from attempting to impose upon Mascaro limitations with respect to access to communications media which he did not assert against Towson and Glen Burnie.***" (Majority Opinion, p. 21)

While Baltimore Snelling does not suggest that distinctions cannot be drawn between a private antitrust action and the instant cause, it respectfully submits that the case cited is sufficiently analagous to the instant one on the point under discussion to support its contention that the issue of

the applicability vel non of an estoppel defense here ought at least be quite closely examined, and after argument.

Respectfully submitted,

Benjamin Lipsitz,
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and Cross-Appellant

[Certificate of Service omitted in printing]

APPENDIX D

[Filed Dec. 6, 1966]

[Caption Omitted in Printing]

OPINION OF THE CIRCUIT COURT NO. 2[4] OF BALTIMORE CITY

MEMORANDUM OPINION

HARRIS, J.:

This case concerns the right of the licensee of an employment agency franchise to resist the operation of a similar franchise by another licensee using the same nationwide name, in a geographical area immediately contiguous to that of the first franchise licensee, under the theory of either a common law ownership vested in the first franchise licensee or under his contractual rights with the licensor of the franchise.

Snelling and Snelling, Inc., a Pennsylvania Corporation having its principal office in Philadelphia (Snelling-Philadelphia), is the owner of a nationally known personnel consulting and employment agency. By contract, it has licensed numerous corporations and individuals to operate similar employment agencies in various sections of the nation under the trade name of "Snelling and Snelling", using its techniques, office procedures, business forms, trade name, and the trademark "Fort Snelling". The consideration for such a license usually consists of an initial lump sum payment by the licensee, plus 7% commissions or "overrides" on the gross monthly business of the licensee.

On July 5, 1960, Snelling-Philadelphia executed a contract with a newly formed licensee, Snelling and Snelling of Baltimore, Inc., a Maryland corporation (Snelling-Baltimore). Maynard Z. Drossner was the principal owner of

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[4]This opinion appears at pages 17-31 of Volume I of the printed "Joint Record Extract", which is indexed at page 2 of the certified transcript of record (R. 2) herein.

Snelling-Baltimore, and held the positions of president and treasurer of the new corporation. As of the date of the contract, Snelling-Philadelphia had granted several licenses to licensees in the suburbs of Philadelphia, but had not granted licenses to any other licensees operating in the suburbs of large urban or metropolitan areas. The contract with Snelling-Baltimore contained the following provision:

> "1. (a) SNELLING hereby grants to LICENSEE the *exclusive* right to use the name SNELLING and SNELLING and/or SNELLING and SNELLING of BALTIMORE, Inc. in connection with one office only to be opened by LICENSEE *in Baltimore, Maryland.* LICENSEE shall not directly or indirectly establish an office or place of business, or move to any locations outside of such territory; nor shall LICENSEE change its name without first obtaining the written consent of SNELLING; nor shall LICENSEE establish any branch or additional office without the written consent of SNELLING." (italics added).

The contract further provided, *inter alia,* that Snelling-Baltimore was to pay $2,000 to Snelling-Philadelphia, plus an override of 5% on the gross monthly receipts of Snelling-Baltimore, plus an additional override of 2% of such receipts to be applied by Snelling-Philadelphia to its national advertising. Another part of the contract provided as follows:

> "LICENSEE and SHAREHOLDERS agree, when requested by SNELLING, to waive any and all objections LICENSEE may legally have against the use of the name "SNELLING AND SNELLING" in territories other than that territory granted to LICENSEE herein."

Snelling-Baltimore began operations in August of 1960. Largely due to the industry, imagination, and extensive advertising of Drossner, Snelling-Baltimore soon became a profitable business in the employment agency field. It is admittedly now the largest such agency in Maryland.

In 1962, Drossner wished to expand his business to include Towson, in Baltimore County, maintaining that he had been assured by Snelling-Philadelphia that his franchise territory included Baltimore County as well as Baltimore City; that Towson was, in effect, a suburb of Baltimore City; and that it was part of the "metropolitan area" contemplated by the parties when the contract was signed. The evidence shows that these efforts were consistently resisted by Snelling-Philadelphia, and that the latter relied upon the literal wording of the Snelling-Baltimore contract to confine the franchise area to the geographical limits of Baltimore City.

After extensive negotiations, Snelling-Philadelphia and Drossner executed contracts whereby the latter was granted franchises to operate two additional offices—one in the Highlandtown section of Baltimore City, and one in Towson. A brief description of these contracts follows.

On December 20, 1963, Snelling-Philadelphia executed a contract with a newly formed corporation known as Snelling and Snelling of Highlandtown, Inc. (Snelling-Highlandtown), organized and operated by Drossner and owned by his wife and him. This contract contains the following pertinent provisions:

> "1. (a) SNELLING hereby grants to Licensee the right to use the registered tradename "Snelling and Snelling", the Fort Snelling registered trademark, and to be identified as a member of the Snelling and Snelling System in connection with the operation of a personnel consulting and employment agency business (herein sometimes called "Licensee's business") to be conducted at an office located within the following area: Bounded on the North by Pulaski Highway; on the East by Kresson Street; on the South by Eastern Avenue and on the West by Broadway. All located within the city of Baltimore."
>
> "(c) In connection with the operation of Licensee's business, Licensee shall use only the name "Snelling and Snelling" and Licensee shall identify itself as a member of the Snelling and Snelling Sys-

> tem, unless state law requires other or additional identification. SNELLING shall not grant to any other person, firm or corporation the right to use the name "Snelling and Snelling" in connection with the operation of a personnel consulting and employment agency office within the area described in paragraph 1(a) hereof; provided, however, that in the event SNELLING shall open offices or grant such right to others outside the described area but within the State where Licensee's office is located, Licensee does hereby release and waive any objection to the use of the name "Snelling and Snelling" in connection therewith."

This contract did not provide for the payment of any initial lump sum amount by Snelling-Highlandtown to Snelling-Philadelphia. The compensation to the latter was to be a flat 7% of the gross monthly receipts from the operation of the licensee's business, with no obligation on Snelling-Philadelphia to use any part thereof for national advertising. As consideration for the omission of a lump sum payment for the Highlandtown franchise, Snelling-Philadelphia exacted from Snelling-Baltimore an agreement that the total 7% overrides in the Snelling-Baltimore contract (5% plus 2% for national advertising) should henceforth become a single 7% payment with no allocation for national advertising.

On January 28, 1964, Snelling-Philadelphia executed a contract with Drossner and Stanley Sackett, providing for the opening of a Snelling and Snelling office in Towson. This contract provided that:

> "1. (a) SNELLING hereby grants to Licensee the right to use the registered tradename "Snelling and Snelling", the Fort Snelling registered trademark, and to be identified as a member of the Snelling and Snelling System in connection with the operation of a personnel consulting and employment agency business (herein sometimes called "Licensee's business") to be conducted at an office located within the following area: the city of Towson, Maryland as of this date."

This contract also contained a paragraph 1(c) identical to the one in the Highlandtown contract, and which is quoted above verbatim.

The Towson contract also provided that the licensees should pay Snelling-Philadelphia a lump sum of $3,000, plus 7% of the gross monthly receipts from the operation of the business.

It is to be noted that there are at least two significant changes between the Baltimore and the two Highlandtown and Towson contracts. First the Highlandtown and Towson contracts omit the word "exclusive" from the description of the right to use the name "Snelling and Snelling" within the designated franchise area. Second, the 7% "overrides" are not allocated between a general 5% override and a 2% override to be specifically applied by Snelling-Philadelphia to "national advertising".

On March 16, 1964, the Towson contract was assigned by Drossner and Sackett to a newly formed corporation known as Snelling and Snelling of Towson, Inc. (Snelling-Towson). This assignment was approved by Snelling-Philadelphia.

On June 14, 1965, Snelling-Philadelphia executed a contract with the newly formed corporation of Snelling and Snelling of Glen Burnie, Inc. (Snelling-Glen Burnie) Drossner was also the organizer of Snelling-Glen Burnie, although Robert L. Cobaugh was listed as president and as a shareholder along with Mr. and Mrs. Drossner. The Snelling-Glen Burnie contract included the same paragraphs 1(a) and 1(c) which are contained in the Highlandtown and Towson contracts, except that the franchise area is designated as "the city limits of Glen Burnie, Maryland". The Glen Burnie contract also provided for a lump sum payment to Snelling-Philadelphia of $2,600, plus the usual 7% override of the gross monthly receipts of the licensee's business.

About five months later, on November 4, 1965, Snelling-Philadelphia executed a contract with the defendant, Angelo

R. Mascaro, to operate a Snelling and Snelling office in the Dundalk-Essex area of Baltimore County, several miles from the office of Snelling-Highlandtown. The franchise area of the Mascaro contract is described as follows:

> "1. (a) SNELLING hereby grants to Licensee the right to use the registered tradename "Snelling and Snelling", the Fort Snelling registered trademark, and to be identified as a member of the Snelling and Snelling System in connection with the operation of a personnel consulting and employment agency business (herein sometimes called "Licensee's business") to be conducted at an office located within the following area: Outside of and East of Baltimore. In the State of Maryland, starting at the city limits of Baltimore East and South of Hwy. 40 to Hwy. 700 (Martin Blvd.), East and South of Hwy. 700 (Martin Blvd.) to Eastern Blvd. (Hwy. 150) South and East on Eastern Blvd. (Hwy. 150) to Wilson Blvd. (Hwy. 587) South and West of Wilson Blvd. (Hwy. 587) as per map attached."

The Mascaro contract also included the same paragraph 1(c) that is contained in Drossner's Highlandtown, Towson, and Glen Burnie contracts with Snelling-Philadelphia. It also provided for payment by Mascaro to Snelling-Philadelphia of a lump sum of $7,800, plus the monthly overrides of 7% on Mascaro's gross monthly receipts.

Shortly thereafter, on January 7, 1965, Snelling-Baltimore filed the bill of complaint in this case against Mascaro, The A. S. Abell Company, and the C. & P. Telephone Company of Maryland. The bill of complaint alleges, *inter alia*, that from July 5, 1960 to the date on which the bill of complaint was filed, Snelling-Baltimore had made extensive investments in advertising; that, through its efforts, it had built a substantial business which had become well known in the Baltimore area under the exclusive trade name of "Snelling and Snelling"; and that, without the plaintiff's prior knowledge, Mascaro had filed an application with the State Department of Labor and Industry for a Maryland

employment agency license to transact business under the trade name of "Snelling and Snelling". The bill of complaint further alleges that Mascaro's actions were "willful and deliberate acts to establish a business in competition" with the plaintiff in the same market, with the intention of capitalizing on the valuable trade name which the plaintiff had popularized through substantial investments; that he had deliberately misled and confused the general public to take advantage of the plaintiff's pre-eminent position in the employment agency field; that the plaintiff "is suffering substantial damage in that the value of its trade name is being injured"; and that the plaintiff would continue to suffer immediate, substantial, and irreparable damage unless Mascaro was enjoined from "further infringement" upon the rights of the plaintiff. The bill of complaint prayed for a temporary and permanent injunction restraining Mascaro from using the name "Snelling and Snelling"; that The A. S. Abell Company be enjoined from accepting advertising from Mascaro under the trade name of "Snelling and Snelling" for publication in the Baltimore *Sunpapers;* and that The C. & P. Telephone Company be enjoined from listing Mascaro in its telephone directories under the trade name of "Snelling and Snelling".

On January 7, 1966, Judge Prendergast signed a temporary ex parte injunction to be effective for a period of ten days. Thereafter, Mascaro filed a motion to dissolve the temporary injunction. A hearing was held before Judge Cullen, and on February 2, 1966, the ex parte injunction was dissolved and an interlocutory order signed, ordering Mascaro to identify his franchise with the designation of "Dundalk-Essex. A. R. Mascaro" immediately following the use of the name "Snelling and Snelling", and to state that he was not connected with any other Snelling and Snelling office. The order was effective as to all stationery, literature, and records used by Mascaro. By its terms, it was to be effective until a "final determination on the merits" of this case.

The evidence shows that Drossner encountered some initial difficulties in the operation of Snelling-Baltimore, pri-

marily due to the failure of a prior Snelling and Snelling franchise for Baltimore City and seven counties extending in all directions from the Baltimore metropolitan area. This former franchise had been granted by Snelling-Philadelphia to two individuals in 1956, but it was unsuccessful and closed in January of 1959, apparently leaving some creditors unpaid. These obstacles were soon overcome by Drossner, however, due to his intensified advertising and apparently boundless energy in building his franchise to its present outstanding position in the employment agency field in Maryland.

Drossner testified that, from the time he began operations in August of 1960 to October 1, 1966, he had spent $112,500 in varied and diversified forms of advertising. During that same period, he had made total payments to Snelling-Philadelphia of $82,740. He further testified that immediately following the opening of the Mascaro office in the Dundalk-Essex area, a number of incidents occurred which showed that there was considerable public confusion concerning Mascaro's ostensible connection with the four Drossner offices. Without recounting all of the incidents in detail, this Court is convinced that confusion did occur and that much of it was due to Mascaro's advertising, which made an undisguised attempt to link his office with the four offices operated by Drossner. In fact, Mascaro admitted that, in response to one telephone inquiry, he stated that "we have five offices in this vicinity".

Mascaro testified that, before he signed his contract with Snelling-Philadelphia, he was given ample assurances by the latter that there would be no legal complications involved. He admitted, however, that he had continued to use the name "Snelling and Snelling" on his income tax returns and in filing his application with the State Department of Labor and Industry for his Maryland employment agency license, even after this Court's restraining order of February 2, 1966.

Robert Snelling, Jr. testified that he is president and treasurer of Snelling-Philadelphia, and that he had conducted

the pre-contract negotiations with both Drossner and Mascaro. The thrust of Mr. Snelling's argument, in defense of Mascaro (paid for by Snelling-Philadelphia), is that (1) the license agreement authorizes the licensee only to maintain one Snelling and Snelling office in the area covered by the contract; (2) the licensee cannot advertise beyond his franchise area; and (3) the business of each licensee is aided, not harmed, by the addition of more and more Snelling and Snelling offices in the same general territory. In other words, each office works not only for itself but for the benefit of all other Snelling and Snelling offices, in a manner akin to a "one big happy family" arrangement. Mr. Snelling maintained that there could be no confusion, although he admitted that Drossner had popularized the name "Snelling and Snelling" and had added "value" to the name in the Baltimore area.

However, Mr. Snelling was unable to explain satisfactorily, at least to this Court, his insistance upon a revision (beneficial to Snelling-Philadelphia) of the Snelling-Baltimore contract when Drossner opened his Highlandtown office. These are Mr. Snelling's words:

> "He [Drossner] was putting it close enough to a border, to kill a potential sale of a franchise in the suburbs, possibly, and because of that I exacted a change in the franchise agreement to 7%."

The only meaning which the Court can place upon this testimony is that the multiple granting of franchises in the same general area does create confusion, and in Mr. Snelling's words, could "kill a potential sale of a franchise" when the offices are located within that same general area. This does not support Mr. Snelling's "one big happy family" theory. If one is to believe Mr. Snelling's testimony that every licensee is aided, not harmed, by the nearby competition of another Snelling and Snelling office, what is the purpose in designating a franchise area in the first place? If, by solicitation and advertising, every Snelling and Snelling licensee can invade, for practical purposes, the franchise territory of

his Snelling and Snelling neighbor, then there would seem to be no purpose whatever in designating geographical boundaries for each licensee.

Moreover, the language of the contracts themselves uniformly emphasizes the particular value of using the name "Snelling and Snelling" without competition. All of the contracts include a provision that the name "Snelling and Snelling", its reputation, its methods, its techniques, and the opportunities acquired by the licensee "as a member of the Snelling and Snelling system" are of "considerable value". Therefore, after termination of the contract, the licensee is prohibited from engaging in a similar business within thirty-five miles of his former franchise area for a period of three years, or "within thirty-five miles of any other Snelling office or franchise area now or hereafter established by Snelling for a period of eighteen (18) months". Again, such a contract provision is hardly consistent with Mr. Snelling's testimony that nearby competing Snelling and Snelling offices provide welcome business assistance for each other.

The evidence is clear and convincing to this Court that Snelling-Philadelphia, by its actions as described in this case, has deliberately encouraged the very type of destructive competion and confusion which its own contracts seek to eliminate after they have been terminated. It is the type of competition which, the evidence shows, results in such confusion that only one party can benefit therefrom—Snelling-Philadelphia. Regardless of the damage to a licensee who has built a substantial business over a period of years, Snelling-Philadelphia gains by a "shotgun" approach which saturates an area with multiple offices, resulting in redoubled efforts by the licensees and a competition so intense that only Snelling-Philadelphia is benefited.

Under these facts, therefore, the Court holds that Mascaro with the encouragement and assistance of Snelling-Philadelphia, has engaged in unfair competition with Snelling-Baltimore, in such a manner that equitable relief is justified. Basi-

cally, the test is whether or not the competition includes the element of deception, in such form that it misleads and deceives the public. This principle is succinctly stated by the Court of Appeals in the case of *Edmondson Village Theatre v. Einbinder*, 208 Md. 38, at page 44 as follows:

> "The essential element of unfair competition is deception, by means of which the goods of one dealer are passed off as the goods of another, and the seller receives the profit which he would not have received except for such deception. Therefore, in order to warrant a court of equity in granting an injunction to restrain unfair competition, the acts complained of must be of such a nature as to mislead and deceive the public, so that the defendant is in effect taking advantage of the good will and business reputation which the complainant has built up through service or advertising or in any manner regarded as lawful and proper."

The earlier case of *Baltimore Bedding Corporation v. Moses*, 182 Md. 229, states the underlying principle of unfair competition in the following language at pages 236-237:

> "This law, both in letter and spirit, is laid upon the premise that, while it encourages fair trade in every way and aims to foster, and not to hamper, competition, no one, especially a trader, is justified in damaging or jeopardizing another's business by fraud, deceit, trickery or unfair methods of any sort. This necessarily precludes the trading by one dealer upon the good name and reputation built by another. *Two Centuries Growth of American Law*, p. 436, W. K. Townsend; *Nims on Unfair Competition and Trade Marks*, 3rd Ed., 6-15.
>
> "What constitutes unfair competition in a given case is governed by its own particular facts and circumstances. Each case is a law unto itself, subject, only, to the general principle that all dealings must be done on the basis of common honesty and fairness, without taint of fraud or deception. Wherever, in

> any case, these elements of fair trade are found to be lacking equity will grant protection against the offending party. *Foss v. Culbertson*, 17 Wash. 2d. 610, 623, 136 P.2d 711, 717."

Counsel for Mascaro has cited several cases in argument which, upon their facts, do not seem to be applicable to this case. In *A. & H. Transportation, Inc. v. Save Way Stations, Inc.*, 214 Md. 325, the Court of Appeals affirmed a lower court decision which found that no unfair competition existed in the use of the trade name "Save Way" gasoline in competition with "Savon" gas. Under the facts of that case, however, the lower court "expressly found that there was no present or prospective confusion" due to the use of the name "Save Way". The Court of Appeals held that "unless some possibility of confusion on the part of the average purchaser were shown, there would be no occasion for granting an injunction". In the instant case, this Court must find from the facts that the only possible and practical result of Mascaro's actions was to create confusion on the part of potential customers of Snelling-Baltimore.

In the case of *National Shoe Stores Company v. National Shoes of New York, Inc.*, 213 Md. 328, the Court of Appeals held that the words "National Shoes" did not constitute a distinctive or unique phrase, and thus they were "not subject to exclusive appropriation as a technical trademark"; that there was no evidence of fraud or deceit; and that the phrase "National Shoes" had not acquired a secondary meaning. Again, it must be emphasized that the instant case does include convincing evidence of deception on the part of the defendant, whether or not it was deliberately intended to accomplish this purpose.

The *Edmondson Village Theatre v. Einbinder* case, *supra*, although fully stating the elements of unfair competition, held that the facts of that case did not justify equitable relief. Commenting on the evidence, the opinion holds that "there was no evidence to show that defendant had been misleading any patrons and inveigling them into driving in-

to the outdoor theatre when they were looking for the indoor theatre". The exact opposite is present in the instant case; and in fact, the legal principles stated in *Edmondson Village Theatre* support the plaintiff's claim for equitable relief here.

Counsel for Mascaro has also cited two out-of-state cases which, in the Court's opinion, are likewise not controlling of the facts in this case. In the case of *Vermont Maple Syrup Company v. F. N. Johnson Maple Syrup Company*, 272 Fed. 478 (D. Vt. 1921), the Vermont District Court of Appeals held, in principle, that a licensee who first uses the trademark or tradename of another in a new territory does not become the absolute owner thereof in that territory. In that case, however, there was no grant of an exclusive right to use a trademark or tradename. The licensor had organized the licensee, but after relinquishing its control of the licensee, was permitted by the Court to make sales under its own trademark and tradename in the territory of its former licensee. This decision was based upon the fact that the licensor did not relinquish its ownership of the trademark and tradename at the time it relinquished its control of the licensee. No such situation exists in the instant case.

In the case of *Pike v. Ruby Foo's Den, Inc.*, 232 F2d. 683 (D.C. Cir. 1956), aff'd sub nom, *Golden City Restaurant, Inc. v. Pike*, 246 F.2d 684 (D.C. Cir. 1957), the Court was faced with the question as to whether a tradename was a proper asset of a business to be sold at a judicial sale. The lower Court held that, as the development of a tradename in one geographical area did not bar its use by another in a different area, the tradename passed with the sale. The Circuit Court of Appeals remanded the case for a determination of the validity of the licensing agreement, holding that the general principle relied upon by the lower court was not controlling, but necessarily had to be based upon the terms of the licensing agreement.

For the above reasons, the Court holds that Snelling-Baltimore is entitled to the relief prayed in the bill of complaint.

This holding is based upon the contract rights which were acquired by Snelling-Baltimore in its contract of July 5, 1960 with Snelling-Philadelphia. The Court cannot agree with the contention of Snelling-Baltimore that it has acquired a common law right to the exclusive use of the name "Snelling and Snelling" in the Baltimore metropolitan area. It has acquired a legal right, by contract, to the *exclusive* use of the name "Snelling and Snelling" in Baltimore City. However, it is clear as a practical matter that the operations of Mascaro, by solicitation and advertising, cannot be effectively confined within his Dundalk-Essex franchise area without invading at least some sections of Baltimore City. Newspapers, telephone lines, and television and radio broadcasts are not inhibited by the arbitrary geographical limits of a franchise area. It is here that Mascaro, with the assistance of Snelling-Philadelphia, infringes upon Snelling-Baltimore's "exclusive right to use the name Snelling and Snelling" in connection with its office located in Baltimore City.

Therefore, the Court will sign a permanent injunction, incorporating the provisions of the interlocutory order signed by Judge Cullen on February 2, 1966, and adding thereto a prohibition against Mascaro's use of the name "Snelling and Snelling" without the identifying suffix in his applications for any licenses from any governmental agency to operate an employment agency, and in any income tax returns filed by him. The Court will not enjoin the defendants, The A. S. Abell Company and the C. & P. Telephone Company of Maryland, from accepting advertising or telephone listings which may be in violation of the injunction against Mascaro. This would place unreasonable restrictions upon these two defendants, who are not parties to the contractual relations between Snelling-Philadelphia and Snelling-Baltimore, or between Snelling-Philadelphia and Mascaro.

/s/ Charles D. Harris
Judge

December 5, 1966.

APPENDIX E

[Caption Omitted in Printing]

DECREE OF THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY[5]

DECREE

(Filed January 4, 1967)

This cause standing ready for hearing on its merits, testimony was taken, counsel for the parties were heard and the proceedings read and considered.

It is thereupon, this 4th day of January, 1967, by the Circuit Court of Baltimore City, ADJUDGED, ORDERED AND DECREED, that the Interlocutory Order herein of February 2, 1966, which by its terms was to be effective pending a hearing and final determination on the merits herein, be and the same is hereby dissolved as to all defendants herein.

AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that Angelo R. Mascaro, one of the defendants, be and he is hereby perpetually restrained and enjoined from using the name "Snelling and Snelling" (or "Snelling & Snelling") (a) in advertising his employment agency business in any news media, (b) in listing his said employment agency business in any alphabetical, classified, or information telephone directory, (c) on any of his stationery (including, but not limited to, envelopes and letterheads), handouts, application agreements, receipts and invoices, business cards and other material distributed to the public, (d) on his applications for any licenses from any governmental agency to operate an employment agency business, and (e) in any income tax returns filed by him, unless he includes the identifying designation of "Dundalk-Essex, A. R. Mas-

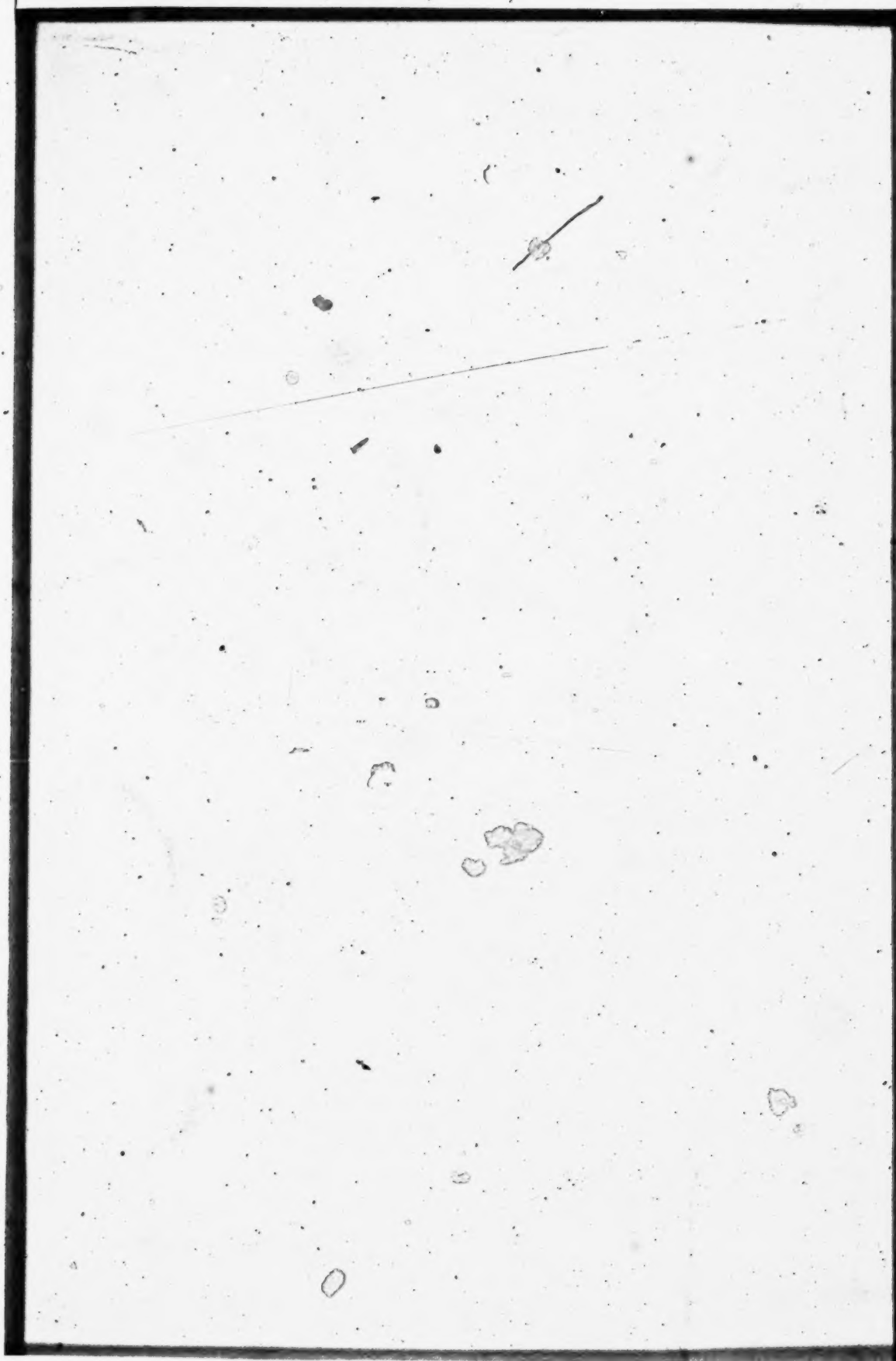
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[5] This Decree appears at pages 31-32 of Volume I of the printed "Joint Record Extract" which is indexed at page 2 of the certified transcript of record (R. 2) herein.

caro", or "(Dundalk-Essex)" "A. R. Mascaro", immediately following said name (and, in the advertising and listing referred to in (a) and (b) above, in the same size type, print or lettering as said name if the use of said name is in typed, printed, written or other graphic form) and the explanatory words "not connected with any other Snelling and Snelling office in this or "the Baltimore area" or "(not connected with any other Snelling and Snelling office)", in a prominent place therein, except that said Angelo R. Mascaro, one of the defendants, be and he is hereby relieved of the necessity of including said identifying designation and explanatory words in connection with the use of said name "Snelling and Snelling" (or "Snelling & Snelling") on the door to the office of his said employment agency business.

AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that said Angelo R. Mascaro, one of the defendants, pay the costs of this proceeding.

Charles D. Harris
Judge.



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SUPREME COURT, U. S.

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OCT 25 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 570

SNELLING AND SNELLING OF BALTIMORE, INC.,
Petitioner,

v.

ANGELO R. MASCARO,
THE A. S. ABELL COMPANY,
AND
THE C. & P. TELEPHONE COMPANY OF MARYLAND,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT, ANGELO R. MASCARO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

AMBLER H. MOSS,
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10 Light Street,
Baltimore, Md. 21202

October 23, 1968.

The Daily Record Co., Baltimore, Md. 21203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 570

SNELLING AND SNELLING OF BALTIMORE, INC.,
Petitioner,

v.

ANGELO R. MASCARO,
THE A. S. ABELL COMPANY,
AND
THE C. & P. TELEPHONE COMPANY OF MARYLAND,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

BRIEF OF RESPONDENT, ANGELO R. MASCARO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Should the Supreme Court grant certiorari when the decision of the state court below is not in conflict with any other decision, presents no issue of public importance, raises no federal question, is significant to the litigants only, is supportable on non-federal grounds, and was correctly decided on the merits?

STATEMENT OF THE CASE

Snelling and Snelling, Inc. (referred to as "Philadelphia Snelling" in the opinion below and hereafter) is a Pennsylvania corporation, engaged in the employment agency business, which licenses franchisees to establish Snelling and Snelling offices in designated areas throughout the country. At the time of the trial there were approximately 280 licensed Snelling and Snelling franchisees throughout the United States, Canada, and Argentina (E. 74, 186, 193, 496).[1] The company originated as a family partnership in June, 1950, trading under the name Snelling and Snelling, and was incorporated in 1956 under the name of Snelling and Snelling, Inc. (E. 187-188). The first franchise was sold in December of 1955 (E. 188). The corporation is still a family corporation (E. 186-187).

In connection with its licensing of franchisees, Philadelphia Snelling grants to its licensees the right to open employment offices within certain designated area, and to use, in connection with that office, the registered trade name "Snelling and Snelling" and the registered "Fort Snelling" trademark (E. 189, 206, 208, 218-219, 239). Philadelphia Snelling gives its licensees detailed training in all phases of the employment agency business and provides manuals setting out the proper methods and the procedures of operating under the Snelling system to be followed by Snelling franchisees (E. 76, 81-84, 126-128, 138-140, 212, 214, 241). Letterhead, invoices and forms of every kind are standard-

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[1] "E." refers to the Joint Record Extract filed in the Court of Appeals of Maryland, part of the record certified by that Court to this Court;

"R." refers to the Record herein;

"P." refers to the Petition;

"Apx." refers to the Appendix to this Brief;

"P. Apx." refers to the Appendix to the Petition.

ized, designed by Snelling, and purchased by the licensees (E. 81, 136, 331-335, 473, 484-489).

Under their contracts, licensees are limited in essentially only two respects: (a) location of office in designated area only, and (b) advertisement restricted to media that substantially serves the area where licensee's office is located (E. 208). Aside from these restrictions on the operation of their business, licensees are permitted to place applicants or service employers anywhere in the country (E. 208).

Many of the numerous Snelling franchisees are in locations suburban to major cities which also contain a licensed franchisee (E. 194-197). Frequently these suburban offices are not owned by the person who owns the city franchises (E. 194-197). In these cases the franchisees located in close proximity advertise in the same local newspapers (E. 194-197).

In early 1960, Maynard Z. Drossner, the President of Snelling and Snelling of Baltimore, Inc., Petitioner herein, called Mr. Robert O. Snelling, President of Philadelphia Snelling, and expressed interest in obtaining a franchise (E. 72, 205). When Drossner first approached Mr. Snelling there were between forty and fifty licensed Snelling and Snelling franchises throughout the country, located mostly east of the Mississippi and in the northeastern quadrant of the United States (E. 73, 74, 190, 240). There was a Snelling and Snelling office in the City of Philadelphia which was run by Philadelphia Snelling (E. 187, 190-193). In addition, there were two or three Snelling and Snelling offices in the suburbs of Philadelphia, all of them owned by different individuals, and all advertising and using the name "Snelling and Snelling" in the Philadelphia newspapers (E. 74-76, 190-193, 206-208, 231-232).

After considering the Philadelphia suburbs and Atlantic City as possible locations for a franchise, Drossner expressed interest in Baltimore (E. 208-209). Snelling had had a prior licensee in the State of Maryland and Baltimore, and this was disclosed to Drossner (E. 77, 209). The prior licensee had been granted a contract which allowed him to open an office within Baltimore City and the following surrounding counties; Howard, Queen Anne, Baltimore, Harford, Carroll, Kent and Anne Arundel (E. 210, 497-502). Robert Snelling testified that a copy of the prior licensee's contract was shown to Drossner (E. 210). The franchise price paid by the first licensee in Baltimore and the aforementioned counties was $12,000. Drossner admitted that he knew that this prior licensee's franchise fee was substantially higher than what he was being asked to pay (E. 77).

Before signing a contract, Mr. Snelling told Drossner that he would be buying the right to put an office in the City of Baltimore, but that he could place people anywhere in the world where he could find a company willing to employ them (E. 210-212). His advertising would be limited to the media in the Baltimore City area (E. 212). Mr. Snelling testified that there was no discussion of the suburbs of Baltimore City except to say that no suburbs would be included as distinguished from the previous licensee's territory (E. 211, 264).

On July 5, 1960, the contract between Snelling and Snelling of Baltimore, Inc., Petitioner, the corporation formed by Drossner, and Snelling and Snelling, Inc., Philadelphia Snelling, was signed. The agreed franchise price was $2,000.00. Included in the terms of the contract was the following provision:

> "1. (a) SNELLING hereby grants to LICENSEE the exclusive right to use the name SNELLING and

> SNELLING and/or SNELLING and SNELLING OF BALTIMORE, INC. in connection with one office only to be opened by LICENSEE in Baltimore, Maryland. LICENSEE shall not directly or indirectly establish an office or place of business, or move to any locations outside of such territory; nor shall LICENSEE change its name without first obtaining the written consent of SNELLING; nor shall LICENSEE establish any branch or additional office without the written consent of SNELLING" (E. 386).

Mr. Snelling testified that he explained the meaning of paragraph 1(a) quoted above as granting to Petitioner the exclusive right to open one office within the City limits of Baltimore, and that Baltimore Snelling could place people anywhere, but would have to advertise in media which served Baltimore (E. 212).

After opening his office in Baltimore City, Drossner then expressed interest in establishing offices in other cities and in Silver Spring, Maryland, Arlington and Alexandria, Virginia, suburbs of Washington (E. 92, 215, 294). At this time Drossner knew that there was a licensee in Washington, D.C. (E. 92, 215-216, 264-265).

In 1962, Drossner approached Snelling about opening an office in Towson, Maryland (E. 219-220, 447-448). According to Mr. Snelling no contention was made by Drossner initially that Towson, Maryland was within the territory outlined in Baltimore Snelling's contract (E. 220, 447-450). Initially, the parties could not agree on the price of such franchise (E. 220, 447-450). In 1963 Drossner wrote to Mr. Snelling and contended that the City of Towson was already within the territory granted him in his contract of July 5, 1960 (E. 220-221, 454-455). Mr. Snelling immediately wrote back denying this (E. 221, 458-460). Mr. Snelling testified that this was the first time Drossner made this contention (E. 220-221). On January 28, 1964, Drossner

and a partner named Stanley Sackett entered into a licensing agreement with Philadelphia Snelling authorizing a Snelling and Snelling office to be opened in Towson, Maryland (E. 223, 395-409). This contract was assigned by Sackett and Drossner to a newly formed corporation, Snelling and Snelling of Towson, Inc. (E. 409-414). The franchise fee was $3,000 (E. 223, 448-449).

Also in 1963 Drossner expressed interest in opening offices in the surrounding suburbs of Baltimore (E. 454-455). Dundalk-Essex was one of the areas in which he showed an interest (E. 223). Eventually he made an offer to open an office in Dundalk-Essex for a franchise fee of $2,000 (E. 91, 223). Mr. Snelling testified that the price for that franchise was $7,800 and Drossner's offer was rejected (E. 223-224).

In 1963 Drossner formed another corporation, Snelling and Snelling of Highlandtown, Inc. On December 20, 1963, this corporation contracted for the opening of a second office within the limits of Baltimore City (E. 414-430). No franchise fee was charged. On June 14, 1965, still a fourth corporation in which Mr. Drossner has an interest, Snelling and Snelling of Glen Burnie, Inc., executed a contract for a franchise in Glen Burnie, Maryland (E. 430-447). The franchise fee was $2,600 (E. 434).

At the time of the execution of these contracts Drossner, with his wife, had a 50% interest in Snelling and Snelling of Baltimore, Inc., Snelling and Snelling of Glen Burnie, Inc., and alone had a 50% interest in Snelling and Snelling of Towson, Inc. (E. 87-90). However, his partners in each were different (E. 87). Bert H. Cohen and his wife were 50% stockholders in Baltimore Snelling (E. 87), Stanley Sackett was a 50% stockholder in Towson Snelling (E. 87), and Robert Cobaugh was a 50% stockholder in Glen Burnie

Snelling (E. 90). Drossner and his wife were sole stockholders of the Highlandtown corporation (E. 90).

Respondent Mascaro first became interested in becoming a Snelling and Snelling licensee in September or October of 1965 (E. 115). On November 4, 1965, Mascaro entered into a licensing agreement with Philadelphia Snelling which granted him permission to operate an employment agency in the Dundalk-Essex area and to use the name Snelling and Snelling in connection therewith (E. 121). The francise fee was $7,800 (E. 470).

After the execution of Mascaro's contract, Drossner contacted Mascaro for the purpose, as Mascaro testified, of "scaring Mascaro off" (E. 174). Mascaro sought reassurance from Philadelphia Snelling that he was not encroaching on anyone's legal rights and could operate in accordance with his contract, and was so assured repeatedly by Philadelphia Snelling (E. 131-133, 143-146, 170-171, 224-263). Mascaro did not know at this time that Drossner had, in the past, attempted to purchase a franchise for Dundalk-Essex (E. 174).

Mascaro opened his office on January 2, 1966 (E. 130). The operation of Mascaro's business is done primarily from his office and by telephone (E. 166-167, 183-184). He advertises in the Baltimore Sun and News Post as does Petitioner and the other Snelling licensees (E. 167, 284-285). Drossner also advertises over WBAL-TV and WBAL radio (E. 44-45, 285, 290-291). Through this medium Petitioner's advertisements reach Hagerstown, Frederick, Bethesda, Silver Spring, Falls Church, Alexandria, Arlington and Washington, D. C. (E. 508-511). Other Snelling licensees with whom Petitioner has no connection have licensed these cities from Philadelphia Snelling (E. 496, Defendant's Exhibit 38).

The Trial Court in an opinion filed on December 6, 1966, found that Petitioner had no common law right to the use of the name of Snelling and Snelling and that its right to use the name derived from its license agreement with Philadelphia Snelling. It further found that the phrase Baltimore, Maryland in the contract between Petitioner and Philadelphia Snelling meant Baltimore City. However, the Court went on to find that by virtue of its contract Petitioner had the exclusive right to the use of the name "Snelling and Snelling" in Baltimore City, and, therefore, while not denying Respondent Mascaro the right to the use of the name "Snelling and Snelling", the Court enjoined Mascaro from using the name unless he added a suffix to distinguish him from Petitioner. It was from this decree that the Respondent Mascaro appealed. Petitioner filed a cross appeal claiming that Mascaro should have been enjoined altogether.

On May 31, 1968, the Maryland Court of Appeals filed an opinion and entered its judgment reversing the decree of the Circuit Court Number 2 of Baltimore City and vacating the injunction imposed upon Mascaro by that Court. The main basis of that Court's decision (and its disagreement with the Court below) was that, as argued by Respondent Mascaro, Petitioner did not have the contract rights it claimed. The Court held that under the terms of the contract, Philadelphia Snelling retained (and, therefore, could license to Respondent Mascaro) the right to use the name "Snelling and Snelling" in ways not connected with the Baltimore office (P. Apx. 12-13). The Court also indicated that because of the conduct of Drossner, Petitioner was "estopped" from the relief it sought. Respondent Mascaro had argued, both orally and in his brief, that the conduct of Drossner supported its version of the meaning of the contract (Apx. 1a-5a).

ARGUMENT

I.

NONE OF THE GROUNDS FOR CERTIORARI AS SET OUT IN SUPREME COURT RULE 19 EXIST IN THIS CASE.

None of the possible grounds for certiorari are present in this case. Essentially the case involves a state court judgment resolving a dispute between private litigants concerning the interpretation of contract rights of the Petitioner. The case has no importance to any one but the litigants and, indeed, Petitioner hardly contends so. As such, it is not a case in which certiorari should be granted. As Mr. Chief Justice Taft, speaking for a unanimous Court, stated in *Layne and Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923):

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

See also *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), where Mr. Justice Frankfurter, speaking for this Court again, reaffirmed the aforegoing language from the *Layne* case and further stated that the Supreme Court does not "sit for the benefit of the particular litigants."

Aggrieved by the decision against it below and lacking better argument, Petitioner attempts to create a "federal question" where none exists. The sole thrust of the Petition is that one of the bases of the decision of the Court of Appeals of Maryland was a ground that was not raised, considered, briefed, or argued below. This "ground" upon which Petitioner claims it had no notice and opportunity

to be heard, was that because of the conduct of one of its principals, Drossner, Petitioner was estopped to claim the relief which it sought in the case.

Petitioner is not entitled to a writ of certiorari because (1) the question of the conduct of Petitioner's principal Drossner and its effect on the interpretation of the contract was raised, briefed and argued by Respondent Mascaro; and (2) even assuming that the Petitioner is correct, and the estoppel point was never briefed or argued below, (a) this does not constitute a denial of due process as claimed by Petitioner and (b) the estoppel point was only an alternative ground for decision, the main basis for decision being the Court's agreement with Respondent's interpretation of the contract under which Petitioner did not have the rights it claimed.

1. *The effect of Drossner's conduct was both briefed and argued below.*

The very basis of Petitioner's application for a writ of certiorari, that the estoppel point was not raised, argued or briefed below (a point also made by the dissenting judge) is factually incorrect. The estoppel theory is based on the acts of Petitioner's principal Drossner (P. Apx. 19-20). The argument that the interpretation of Petitioner's contract should be consistent with the actions of Drossner and Petitioner was raised in Respondent's Answer to the Bill of Complaint (E. 15-16), was urged before the Trial Court, and argued and briefed before the Maryland Court of Appeals. The portion of Respondent Mascaro's brief below that covered this point is reprinted in the appendix herein (Apx. 1a-5a). While the "estoppel" nameplate was not placed on this ground by Respondent in support of its position, it was urged by Respondent throughout the entire case. Thus, there is no federal question because, contrary

to Petitioner's contention, the consequences of Drossner's and Petitioner's actions with respect to the construction of Petitioner's contract were presented to the court for determination and were both argued and briefed before the Maryland Court of Appeals.

2. a. *Decision in a case on a legal theory not raised, argued or briefed by the parties does not constitute denial of due process.*

Even assuming that the estoppel point was never raised, briefed or argued as Petitioner contends,[2] this does not constitute a denial of due process. Maryland Rule of Procedure 885 provides that the Court of Appeals "will not *ordinarily* decide any point or question which does not plainly appear to have been tried and decided by the lower court; . . ." (Emphasis added). Thus, by this rule the Maryland Court of Appeals *may* consider points not raised below. In *Kares v. Maryland,* 215 Md. 396, 137 A. 2d 712 (1958), the Court stated:

> "Although Rule 885 of the Maryland Rules permits us to decide questions not tried and decided below, under some circumstances, it does not authorize us to decide points not presented."

In any event, a distinction should be made between points to be decided and theories on which decisions are made. The point to be decided in the case between Petitioners and Respondent was the legal right Petitioner obtained under its contract with Philadelphia Snelling. This was the point decided by the Trial Court in Baltimore City, and the point decided by the Maryland Court of Appeals. Petitioner's complaint is with one of the theories upon which the Maryland Court decided the case. Due process

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[2] As is pointed out *supra,* at p. 10, this contention by Petitioner is vigorously contraverted.

does not require that a court agree with the theories propounded by either side in determining a point or question raised before it. Indeed, this Court may consider any grounds for sustaining a judgment below even if those grounds were not raised below. Stern and Gressman, *Supreme Court Practice* 264 (3rd Ed.); see *Walling v. General Industries Co.*, 330 U.S. 545 (1947); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940). This Court may even consider points not raised in the brief in opposition to the petition. See, *e.g.*, *Wiener v. United States*, 357 U.S. 349 (1958); *N.A.A.C.P. v. Alabama*, 360 U.S. 240 (1959).

In any event by raising the question through its Petition for reargument, Petitioner has, in effect, presented it for determination by the Maryland Court of Appeals, which has again not agreed with Petitioner's version as evidenced by its denial of the petition for reargument.

b. *The estoppel point was only an alternative grounds for the decision.*

The estoppel point does not constitute the only basis for the Maryland Court of Appeals' decision against Petitioner and in favor of Respondent Mascaro. Respondent's basic arguments went to the construction of the contract language which granted Petitioner its Snelling and Snelling franchise. Specifically the contract language which had to be construed by the Court was as follows:

> "1. (a) SNELLING hereby grants to LICENSEE the exclusive right to use the name SNELLING and SNELLING and/or SNELLING and SNELLING OF BALTIMORE, INC. in connection with one office only to be opened by LICENSEE in Baltimore, Maryland. LICENSEE shall not directly or indirectly establish an office or place of business, or move to any locations outside of such territory; nor shall LICENSEE change

its name without first obtaining the written consent of SNELLING; or shall LICENSEE establish any branch or additional office without the written consent of SNELLING."

Respondent contended that by this language Petitioner had the exclusive right to open a Snelling and Snelling office within Baltimore City, but that this did not preclude Respondent from opening an office outside of Baltimore City and advertising in media serving Respondent's area, even if these media were also being used by Petitioner. In support of his contention Respondent pointed to the plain language of the contract, the conversations between Drossner and Mr. Snelling prior to and leading up to the execution of the contract by Petitioner, the acts and conduct of Drossner and Petitioner subsequent to the execution of the contract and the workings of the "Snelling system" which was known by both Drossner and Petitioner.

The Maryland Court of Appeals agreed with Respondent's contentions as to the construction of the contract and rejected Petitioner's. The Court stated:

> "We agree, however, with the appellant's argument, that the grant of an 'exclusive' right to use the name 'Snelling and Snelling' *in connection with one office in Baltimore* is not an unrestricted right. Philadelphia Snelling retained a right, and could assign to others the right, to use the name in Baltimore in ways not connected with the Baltimore office. To hold otherwise would give rise to the conclusion that Baltimore Snelling might, if it wished, prevent Philadelphia Snelling from advertising in national magazines which circulated in Baltimore. This was clearly not intended by anyone." (P. Apx. 12-13).

Thus, the Maryland Court of Appeals, as its main basis for decision, accepted Respondent's arguments as to how the contract should be construed. The estoppel point was

only an alternative grounds and was so recognized by the dissenting judge who stated:

> "In the majority opinion, as an alternative ground for reversing the Chancellor's decree it is indicated that Baltimore Snelling is equitably estopped from challenging the validity of the licensing system which Drossner 'used to his own advantage when he obtained the Towson and Glen Burnie franchises and from attempting to impose upon Mascaro limitations with respect to communications media he did not assert against Towson and Glen Burnie." (P. Apx. 25).

Accordingly, no grounds for certiorari exist where, as here, adequate non-federal grounds supporting the decision below exist. As has been stated by Mr. Justice Brennan:

> "*Third*, even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law." Mr. Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar Ass'n Q. 393, 399-400 (1960).

This Court has expressed the rule in even stronger terms to the effect that the Court has jurisdiction to review "only if the federal ground had been the *sole* basis for the [state court] decision. . . ." *Department of Mental Hygiene of California v. Kirchner*, 380 U.S. 194, 198 (1965); *Klinger v. State of Missouri*, 13 Wall. 257, 263 (1872); *Fox Film Corporation v. Muller*, 296 U.S. 207, 210 (1935).

Thus, even if the decision of the Maryland Court of Appeals on the estoppel point is assumed to raise a federal question as Petitioner contends (and which Respondent vigorously denies, see pp. 10-11, supra), this Court still does not have jurisdiction to review and should not grant a writ of certiorari because of the existence of adequate non-federal grounds to support the decision of the Maryland Court of Appeals.

II.

THE CASE WAS DECIDED CORRECTLY ON THE MERITS BELOW.

The key to Petitioner's case is that it contends that its contract with Philadelphia Snelling gives it the exclusive right to use the name "Snelling and Snelling" in Baltimore City. The Maryland Court of Appeals correctly determined, in construing the Petitioner's franchise contract, that it had no such right. The key sentence of Petitioner's contract reads: "Section 1(a) Snelling hereby grants to Licensee the exclusive right to use the name Snelling and Snelling and/or Snelling and Snelling of Baltimore, Inc., in connection with one office only to be opened by Licensee in Baltimore, Maryland" (E. 386). Baltimore Snelling's "right to use the name" is only a right to use it in connection with one office in Baltimore, Maryland. The phrase does not say that Petitioner has the exclusive right to use the name in Baltimore, Maryland, but only the exclusive right to use the name in connection with one office in Baltimore, Maryland. The phrase "Baltimore, Maryland" does not modify "exclusive right to use the name" but indicates where the location of the office is to be placed. Even within Baltimore, Petitioner has no unrestricted right to use the name. He may not use it in Baltimore other than in connection with "one office only". This is the plain meaning of the language and is made further obvious by the additional portion of Section 1(a) which specifically denies to Baltimore Snelling the right to open "any branch or additional office" (E. 386). Since the right to use the name in Baltimore other than in connection with an office located there was not granted to Petitioner it was obviously retained by Philadelphia Snelling, the owner of the tradename, and can be granted to others by Philadelphia Snelling, including Respondent Mascaro.

Petitioner contends that if it was not granted the exclusive right to the use of the name in Baltimore City, then the word "exclusive" in the contract is being given no effect. This is not so. Just what is the exclusivity of the grant to Petitioner in its contract? The exclusivity results from the fact that Philadelphia Snelling cannot place another licensee in an office within Baltimore City. This is the limitation on Philadelphia Snelling and the grant to Petitioner, that is, the assurance that no other Snelling and Snelling franchisee could be granted a franchise for an office within the City of Baltimore. Respondent Mascaro's contract does not grant him the right to place an office in Baltimore City but only in a designated portion of Baltimore County (E. 467-468). This is where his office is located.

In agreeing with Respondent Mascaro's construction of the contract, the Maryland Court of Appeals indicated that to hold otherwise would give rise to the conclusion that Petitioner might, if it wished, prevent Philadelphia Snelling from advertising in national magazines which are circulated in Baltimore and stated that this was clearly not contended by anyone (P. Apx. 12-13). Additionally, the Court pointed to the fact that Drossner obtained franchises in Towson and Glen Burnie, which advertised in the same news media as Petitioner and that to permit Drossner and Petitioner to limit Respondent Mascaro when he had not so limited Towson and Glen Burnie "would be to sanction the weaving of the very web of broader exclusivity *which he failed to achieve by contract*" (Emphasis added) (P. Apx. 20). For this and other reasons raised by Respondent below, it is apparent that the case was correctly decided on the merits below, an additional reason why certiorari should not be granted.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

AMBLER H. MOSS,

WILLIAM R. DORSEY III,

Counsel for
Angelo R. Mascaro,
Respondent.

October 23, 1968.

APPENDIX

Excerpt from Brief of Respondent Mascaro in Court of Appeals of Maryland.[1]

* * * * * *

b. The negotiations for the contract and the conduct of the parties show that Baltimore Snelling's and the Trial Court's construction of the Contract was wrong.

Even if Section 1(a) of the contract between Baltimore Snelling and Parent Snelling be considered ambiguous such that evidence of the negotiations and conduct of the parties would be considered in interpreting the phrase to determine the intent of the parties, such evidence and the conduct of the parties does not support Baltimore Snelling's contentions with respect to construction of the contract. Mr. Snelling testified that prior to the contract he explained the working of the Snelling and Snelling system to Drossner. He testified that he made clear that Drossner was being given the right to open up an office in Baltimore City and that alone (E. 210-212). Drossner was aware of the situation that existed in Philadelphia at that time, that is, that there were suburban offices in close proximity to the office in the City of Philadelphia (E. 206-208). Indeed, he initially expressed interest in purchasing such a suburban office (E. 206). Additionally, shortly after signing his contract for Baltimore City he sought options for suburbs of Washington knowing that a licensee existed in Washington, D.C. (E. 92, 215-216, 394). Drossner obviously knew that if granted a Philadelphia or Washington suburb franchise, he would be advertising in the same newspapers as the city licensee, and perhaps, other suburban licensees.

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[1] A copy of the full Brief has been certified to this Court by the Clerk of the Court of Appeals of Maryland.

Drossner's actions in connection with his purchase of the Towson franchise are also indicative that his contentions regarding interpretation of the contract were an afterthought. His initial correspondence with reference to the Towson franchise indicate that he clearly regarded it as separate and distinct from the franchise he had been granted (E. 447-448, 450). At first he balked at paying a franchise fee for it, not because he regarded it as included in his territory, but because he regarded it as too small (E. 447). In the end, however, he did pay a franchise fee for it (E. 223, 398). If it was for sale to Drossner, it was just as much for sale to anybody else. Nor can it be claimed by Baltimore Snelling or Drossner that his actions in connection with the Towson franchise were based on the fact that the contract of July 5, 1960, restricted him to one office. He sought for and did obtain the license to open an additional office within Baltimore City and paid no franchise fee for it (E. 414-430). However, he did pay the requested franchise fee for Towson as it was initially suggested to him (E. 223, 398, 448-449).

Additionally Drossner sought and paid for an additional franchise in Glen Burnie. It is obvious that any Glen Burnie franchise would have to use the Baltimore Sun and News Post for advertising purposes as well as radio and television stations located in Baltimore. In that sense a Glen Burnie franchise would be using the name Snelling and Snelling in Baltimore to the same extent Mascaro seeks. Purchase by Drossner of the Glen Burnie franchise was recognition of the fact that it was for sale to him just as it would be to anybody else.

In fact, Drossner actually negotiated and sought to purchase the very franchise that Defendant Mascaro purchased (E. 223). He couldn't come to terms on the price to be paid

for the franchise, which is the reason he was unable to obtain it (E. 223-224). This is the real reason for this action here.

In connection with the purchase of the additional franchises in Towson and Glen Burnie and also in Highlandtown it is significant to note that those contracts spell out the nature of the grant or franchise exactly as Defendant Mascaro and Mr. Snelling contend the Baltimore Snelling contract should be interpreted. The pertinent sections of those contracts, signed by Drossner, and showing the nature of the franchise grant are as follows:

> "1. (a) SNELLING hereby grants to Licensee the right to use the registered tradename 'Snelling and Snelling', the Fort Snelling registered trademark, and to be identified as a member of the Snelling and Snelling System in connection with the operation of a personnel consulting and employment agency business (herein sometimes called 'Licensee's business') to be conducted at an office located within the following area: [Area Described]
>
> "1. (c) In connection with the operation of Licensee's business, Licensee shall use only the name 'Snelling and Snelling' and Licensee shall identify himself as a member of the Snelling and Snelling System, unless state law requires other or additional identification. SNELLING shall not grant to another person, firm or corporation the right to use the name 'Snelling and Snelling' in connection with the operation of a personnel consulting and employment agency office within the area described in paragraph 1(a) hereof; provided, however, that in the event SNELLING shall open offices or grant such right to others outside the described area but within the State where Licensee's office is located, Licensee does hereby release and waive any objection to the use of the name 'Snelling and Snelling' in connection therewith.
>
> * * * * * *

"6. (b) Licensee shall advertise only in media which maintain a substantial circulation or audience within Licensee's franchise area" (E. 395-396, 401, 415-416, 420, 431-432, 436).

Indeed Drossner has agreed with Parent Snelling to execute a contract for Baltimore Snelling in the same form and containing the same provisions as above (E. 106-107, 461-464). The "reason" such a contract has not been executed is ostensibly the reluctance of Drossner's partner in Baltimore Snelling, Burt Cohen (E. 106-107, 461-464). It is significant that Cohen was not a participant in negotiations leading up to the execution of the Baltimore contract (E. 205-215), and did not testify at trial.

At trial Baltimore Snelling introduced evidence of sums spent on advertising. Included in these sums were expenditures for the Towson, Highlandtown and Glen Burnie offices (E. 71-72, 301-302). Thus, Baltimore Snelling seeks advantage from lumping itself with the other Snelling and Snelling franchises in which Drossner has an interest. Actually, the four corporations advertise as one (E. 71-72), and are apparently treated as one by their operators. Indeed a reading of the opinion below indicates that the Trial Court treated the other corporation as complainants also (E. 24, 301, 302). But the Towson, Glen Burnie and Highlandtown offices all specifically waived any objections to Mascaro's use of the name "Snelling and Snelling" (E. 396, 416, 432). Drossner and Baltimore Snelling knew this was an inherent factor in the Snelling system and that this was the intent of the Baltimore Snelling contract. In short, this interpretation of the contract is the consistent approach taken by the Parent Snelling office and is in fact the Snelling system.

Actually the contention with regard to use of the name Baltimore Snelling attempts to put forward here is illogical

and not commercially realistic. Baltimore Snelling's main complaint concerning the Defendant Mascaro is his advertisements in the Baltimore newspapers. Of course, newspapers do not recognize geographical boundaries. In this connection, it should be noted that the evidence showed that Baltimore Snelling advertised over WBAL-TV and radio (E. 285, 290-291). The coverage of these media extends to Washington, Silver Spring, Hagerstown, Bethesda, Arlington, Alexandria and Frederick (E. 508-511). In each of these locations there are other Snelling and Snelling licensees (E. 496) so that, in a sense, Baltimore Snelling is also using the name Snelling and Snelling in areas where other licensees are located.

In short, the evidence shows that the workings of the Snelling system are such that licensees are granted certain geographical areas in which to place an office and are promised that no other licensee will be granted an office within that territorial limitation. However, licensees are permitted to advertise in any media that substantially serves its area and to place or serve customers wherever located. Drossner knew of this system before he signed the contract and the evidence shows that he evolved his theory of the contract only as an afterthought.

* * * * * *